LEGAL LESSONS LEARNED:

RECENT CASES FROM MY FIRE & EMS LAW NEWSLETTERS

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[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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Chap. 1        American Legal System, incl. Fire Code, Fire Invest.
Chap. 2        Line Of Duty Death / Safety
Chap. 3        Homeland Security, incl. Active Shooter, Cybersecurity
Chap. 4        Incident Command, incl Training, Drones
Chap. 5        Emergency Vehicle Operations
On Nov. 25, 2020, in State Farm Fire & Casualty Company, as Subrogee of Yolanda Clarke v. Real Wood Fabricating, LLC, the Appellate Division of the Supreme Court of the State of New York, held (5 to 0) that the trial court properly denied summary judgment to the plaintiff insurance company and also to defendant Real Wood Fabricating.

“After paying Clarke over $389,000 for the property damage caused by the fire, plaintiff, as subrogee of Clarke, commenced this action against defendant, alleging that defendant negligently caused the fire by failing to remove combustible floor materials from the garage. Following joinder of issue, plaintiff moved for summary judgment on the complaint, relying on the opinions of Holter and Thomas and the deposition testimony of Clarke and McCarty. Defendant opposed the motion and cross-moved for summary judgment dismissing the complaint, submitting an affidavit of Jason Karasinski, president and owner of Fire Research & Technology Inc., who was retained ‘to review the investigation of [the] fire.’ Karasinski concluded that the reports prepared by Holter and Thomas were speculative and that their investigations failed to follow the standards promulgated by the National Fire Protection Association (hereinafter NFPA). Supreme Court denied both motions, finding that the conflicting expert opinions presented issues of fact and credibility as to causation. Defendant appeals and plaintiff cross-appeals.

“We affirm. The record demonstrates that all three experts were duly qualified by their education, training and experience to conduct a fire scene investigation.”
MA: SPRINKLER LAW – WHEN CITY ADOPTS STATE LAW, UNLICENSED “SOBER HOMES” – 6+ RESIDENTS MUST COMPLY

On Nov. 23, 2020, in Crossing Over, Inc. v. City of Fitchburg, the Appeals Court of Massachusetts upheld (3 to 0) the trial judge’s decision upholding Automatic Sprinkler Appeals Board, and the Fire Chief’s March 8, 2017 letter requiring sprinklers be installed since home has 8 residents. Case remanded to trial judge concerning whether statute violates federal or state laws discriminating against disabled.

“Crossing Over notes that G. L. c. 148, § 26H, carves out from the obligation to install sprinklers "fraternity houses or dormitories, rest homes or group residences licensed or regulated by agencies of the commonwealth," and suggests that the carve-out means that the Legislature either intended to relieve group homes and lodging houses of the obligation to install sprinklers, or that different treatment should be afforded group homes. Lodging houses for the disabled, Crossing Over argues, should be treated in the same manner. The premise is incorrect. The distinction drawn between the lodging houses and other congregate living arrangements in G. L. c. 148, § 26H, preserves the regulatory authority granted to State agencies and municipalities over licensed group homes, dormitories, or fraternities, but does not generally exempt them from fire safety regulation.” https://law.justia.com/cases/massachusetts/court-of-appeals/2020/19-p-903.html

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Sober homes, however, are not licensed by the Commonwealth. Instead they are subject to a voluntary State accreditation and training program, G. L. c. 17, § 18A, inserted by St. 2014, c. 165, § 37; accreditation is required if the sober home is to receive referrals from State agencies. G. L. c. 17, § 18A (h). Contrast G. L. c. 111, § 73 (providing fines for operation of rest home without license). General Laws c. 148, 26H, thus has the effect of extending the sprinkler statute to lodging houses that are sober homes; other statutes and regulations extend varying levels of fire safety standards to other congregate living arrangements.” https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZn5gKg3cdbP6IN7E7ywDm7QNgGMGGI Vm2eo9gH1WNWLv

Legal Lesson Learned: State sprinkler code can be enforced not only against state-licensed facilities, such as rest homes and group mental health facilities, but also to unlicensed “sober houses” voluntarily seeking State accreditation in order to receive patient referrals from State agencies.

Note: The Court described how fire codes nationwide have expanded after tragic fires, including the Triangle Shirtwaist Factory Fire in New York (1911 – 146 died), and the Cocoanut Grove nightclub fire in Boston (1942 – 492 died). [Footnote 5.] Sprinkler codes in Massachusetts were also expanded after tragic fires.

“The Commonwealth's sprinkler laws reflect a patchwork of requirements enacted, seriatim, in response to various tragedies. ‘[F]ollowing a fire in a luxury high rise hotel that killed nine firefighters,’ MacLaurin v. Holyoke, 475 Mass. 231, 245 n.33 (2016), "automatic sprinklers were first required in 1972, in new high rise buildings throughout the Commonwealth, for buildings built after March 1, 1974. See G. L. c. 148, § 26A;
St. 1973, c. 395, § 1." Id. at 245. "In 1982, following a deadly fire in Fall River, the commercial sprinkler provision, applicable to new nonresidential buildings of more than 7,500 square feet, and existing such buildings when they underwent 'major alterations,' was adopted." Id., discussing G. L. c. 148, § 26G, inserted by St. 1982, c. 545, § 1. "]In 1986, after a major fire in the Prudential Center in Boston, sprinklers were required in existing, and not just new, high rise buildings across the Commonwealth, G. L. c. 148, § 26A 1/2, with a ten-year phase-in period. St. 1986, c. 633, § 2." (Footnote omitted.) MacLaurin, supra. The sprinkler requirement for lodging houses at issue in this case was enacted within two years of the 1984 Elliot Chambers rooming house fire, a fire in Beverly in which fifteen people died and fourteen more were injured. See G. L. c. 148, § 26H, inserted by St. 1986, c. 265; Ortega, 1984 Beverly Fire Etched into Memory of Witnesses, Boston Globe (July 4, 2014), https://www.bostonglobe.com/metro/2014/07/03/three-decades-later-beverly-rooming-house-fire-that-killed-leaves-legacy-loss-and-reform/PljEBDRo6WmiAs5L84MRNP/story.html [https://perma.cc/VXQ7-R5NF]."

CA: ARSON – EMPLOYEE FIRED COFFEE SHOP - SEARCH WARRANT UPHELD – U.S. SUP. CT’s “GOOD FAITH EXCEPTION” ALSO APPLIES

On Oct. 13, 2020, in The People v. Muhammad Khan, the Court of Appeal of the State of California (Sixth Appellate District), held (3 to 0) unpublished decision, that the trial court judge had properly denied the defense motion to suppress evidence seized at defendant’s home. Court also held that even if the search warrant was found to be technically deficient, the evidence was properly allowed into evidence based on the U.S. Supreme Court's “good faith exception” in United States v. Leon, 468 U.S. 89 (1984), https://supreme.justia.com/cases/federal/us/468/897/

“Even if a close question, we conclude that the issuing magistrate had a substantial basis for concluding that probable cause existed for issuance of the search warrant, i.e., there was a fair probability that evidence of the crime would be found in defendant's home. In Leon, the United States Supreme Court recognized a good faith exception to the exclusionary rule where police conduct a search in ‘objectively reasonable reliance’ on a warrant later held invalid. (Leon, supra, 468 U.S. at p. 922; see id. at p. 924 [the good-faith exception turns on objective reasonableness].) The court explained: ‘It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient.’ (Id. at p. 921.)

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[SEARCH WARRANT AFFIDAVIT]

Based on his experience that people often keep receipts from recent purchases, Detective Bulatao stated his belief that receipts from purchases of ‘items pertaining to [the] investigation (i.e. gas purchases, towels,
canisters)’ would be found in defendant’s residence. He also stated, based on his training and experience, that he knew that fire accelerant is ‘contained in canisters or other containers,’ that ‘persons who use accelerants to soak rags, such as the blue towels in this case, may do so in the safety of their homes to avoid detection,’ that ‘those canisters or other containers of accelerant may be found if a search is conducted,’ and that ‘when a specific item is used in a crime—in this case, blue towels cut into rags’—‘often more of the same type of items will be found in a person’s home.’ The detective believed that ‘a certified canine’ would provide ‘great assistance in locating the presence of accelerant.’ The detective also knew, based on his training and/or experience, that ‘liquids [such] as a fire accelerant can often spill onto a person’s clothes,’ that ‘dogs trained in accelerant detection can alert to the presence or non-presence of an accelerant,’ and that ‘personal items of clothing will be found in a person’s residence.’”

Legal Lesson Learned: U.S. Supreme Court’s “Good Faith Exception” helps ensure that evidence seized pursuant to a search warrant will be introduced in evidence at trial.

1-67

TN: FIRE MARSHAL – OPPOSED CANDIDATE FOR ALDERMAN – CITY PHONE, ON DUTY – NO FED. 1st AMEND VIOL., LAWSUIT DISMISSED

On Sept. 17, 2020, in Chris Spencer v. City of Henderson, et al., U.S. District Court Judge Aleta A. Trauger, U.S. District Court for the Middle District of Tennessee (Nashville Division) granted the defendants’ motion to dismiss; a political activist who lost (by 359 votes) an election to become a city Alderman. He had campaigned for “small government – anti-corruption” and sued Fire Marshal Paul Varble and City alleging Varble used city phones while on duty to oppose his candidacy.

“Even though Varble is alleged to have engaged in this conduct during City time and using City resources, the court cannot find that this behavior would deter a person of ordinary firmness from continuing to campaign on his own behalf and to attempt to spread his own political message. An adverse campaign is the price of running for political office. The fact that Varble may have violated state law or a city ordinance while campaigning against Spencer does not make the conduct so adverse as to give rise to a First Amendment retaliation claim.”

Legal Lessons Learned: Fire & EMS departments should have a policy concerning political activity on duty, and use of FD computers, cell phones or other property concerning political candidates.

Note: Hamilton County Ohio requires employee annual refresher training – see their Manual, “Ethics In Government Guide For Employees”:
Ohio Revised Code 2921.43(C)(2): 2921.43 Soliciting or accepting improper compensation:
http://codes.ohio.gov/orc/2921.43  [Note: RC 2921.43(C)(2) applies to ALL employees, both classified and unclassified.]

(C) No person for the benefit of a political party, campaign committee, legislative campaign fund, political action committee, or political contributing entity shall coerce any contribution in consideration of either of the following:

(1) Appointing or securing, maintaining, or renewing the appointment of any person to any public office, employment, or agency;

(2) Preferring, or maintaining the status of, any public employee with respect to compensation, duties, placement, location, promotion, or other material aspects of employment.

See also: 123:1-46-02 Political activity of employees in the classified service of the state.
http://codes.ohio.gov/oac/123:1-46-02

(C)(7) Campaigning by writing for publications, by distributing political material, or by writing or making speeches on behalf of a candidate for partisan elective office, when such activities are directed toward party success;

(8) Solicitation, either directly or indirectly, of any assessment, contribution or subscription, either monetary or in-kind, for any political party or political candidate.

(D) An employee in the classified service who engages in any of the activities listed in paragraphs (C)(1) to (C)(13) of this rule is subject to removal from his or her position in the classified service.”

1-66

GA: CONTROLLED BURN AT FORT STEWART – BURN LEFT PROPERTY, DAMAGED LOGGING EQUIPMENT – IMMUNITY

On August 24, 2020, in Foster Logging, Inc. and American Guarantee & Liability Insurance Company v. United States of America, the U.S. Court of Appeals for the Eleventh Circuit (Atlanta, GA) held (2 to 1) that U.S. District Court judge properly granted the U.S. Government’s motion to dismiss based on the “discretionary function” exception to liability under the Federal Tort Claims Act, since the U.S. Forestry Branch exercised discretion on how it conducted and monitored the controlled burn at Fort Stewart – Hunter Army Airfield.

“We assume, as we must at this stage, that U.S. Forestry Branch officials were negligent in their observation, monitoring, and maintenance during the controlled burn itself as alleged in the complaint. But that alleged conduct—the steps and measures taken to safely execute a controlled burn—by its nature, involves an exercise of discretion and considerations of social, economic, political, and public policy. *** The government's decisions about how to monitor and maintain a controlled burn are shielded from judicial second-guessing by the discretionary-
Legal Lessons Learned: This case does raise the question of why someone wasn’t posted to make sure the “controlled burns” stayed on Ft. Stewart property.

1-65

CT: WAREHOUSE FIRE – 1500 BARRELS OILS – NO CODE INSPECTIONS 15 YRS, USED WATER NOT FOAM - IMMUNITY

On Aug.18, 2020, in 25 Grant Street, LLC v. City of Bridgeport, et al., the Court of Appeals of the State of Connecticut, held (3 to 0) held that the trial court properly granted summary judgment to the City, but on different grounds: that the June, 2018 complaint alleging city negligence in failing to find fire code violations was filed too late under statute of limitations.

“In the present case, the plaintiff failed to provide the city with notice of its theory of liability concerning fire code violations in the warehouse in all iterations of the complaint preceding the proposed June, 2018 complaint. Thus, even if the plaintiff described this theory in its response to an interrogatory, this response alone is insufficient for it to relate back for purposes of compliance with the statute of limitations.”

Legal Lessons Learned: Government mental immunity prevailed, but alleged failure to inspect a large warehouse in 15 years raises serious questions about the City’s code enforcement practices.


“This certified appeal arises out of a tragic fire in which four residents of a Bridgeport public housing complex — Tiana N.A. Black and her three young children — lost their lives.

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“The Appellate Court reversed [trial court’s summary judgment for the city], concluding that a jury reasonably could find that the conduct of the municipal defendants demonstrated ‘a reckless disregard for health or safety under all the relevant circumstances’ and, therefore, that they were potentially liable pursuant to § 52-557n (b) (8).”
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RI: FIRE INVESTIGATIONS - ADJUSTERS, RESTORES CAN CONTACT OWNERS, BUT NOT VISIT SCENE 24 HRS

On Aug. 11, 2020, in Ernest G. Pullano, PA, doing business as Pullano Public Adjusters, LLC, et al. v. Rhode Island Division of State Fire Marshal, U.S. District Court Judge John J. McConnell, Jr., District of Rhode Island, granted the State’s motion to dismiss, based on the Judge’s narrow interpretation of the statute – does not prohibit e-mail or other off-premises contact with property owner.

“The Court is convinced that the second interpretation, using the ‘series-qualifier principle,’ is the correct interpretation and thus holds that R.I. Gen. Laws § 23-28.2-11 only prohibits solicitation on the premises during an investigation. It does not prohibit other types of non-premises solicitations, like phone, email, or mail. And it does not prevent on-the-premise solicitations if the person is invited onto the property by the homeowner. This is the right interpretation because it offers the most logical reading of the plain language of the Statute, while following the State's interpretation of the Statute, and avoiding constitutional transgressions.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZuQf%2BCvER%2BbrYG4WrLB4Y1QfdBBmlMCsuqE1%2FSqG9cxo

Legal Lessons Learned: The State may now either accept this interpretation of the statute, or seek to appeal the decision.

Note: See Florida statutes on public adjusters – 48 hour notice visit property:

“The law states that company adjusters, independent adjusters, attorneys, investigators, or others acting on behalf of the insurer must give the insured, claimant, public adjuster or legal representative of the insured at least 48 hours notice that they need access to the damaged property. The insured or claimant can waive this notice.”

MD: PG COUNTY FIRE CHIEF – BATTALION CHIEFS TO OUTRANK VOLUNTEER CO. CHIEF - AUTHORIZED

On Aug. 4, 2020, in Prince George’s Volunteer Fire And Rescue Association, Inc. v. Prince George’s County, Maryland, the Court of Special Appeals of Maryland, held (3 to 0; unreported decision) that the County Fire Chief had the authority in 2016 to issue revised General Order 01-03 that elevated the rank of County Battalion Chiefs, over that of Chiefs of volunteer fire companies.

“Ultimately, PGCVFRA failed to sufficiently allege that it suffered irreparable injury through the Fire Chief's revision of General Order 01-03 and its amendment of the chain of command. As noted in our discussion on PGCVFRA’s governmental takings claim, PGCVFRA failed to establish any sort of injury. Its claims regarding potential injury are hypothetical, speculative, and depend on future—uncertain—conduct
that PGCVFRA alleges the County may undertake. The speculative nature of these complaints is apparent, and these ‘mere allegations’ are insufficient to ground PGCVFRA’s claim for permanent injunctive relief.”


Legal Lessons Learned: The County Fire Chief has authority over firefighting and chain of command.

Note: Under revised General Order 01-03, the relevant portion of the chain of command reads as follows:

1. County Fire Chief
2. Chief Deputy
3. Deputy Fire Chief
4. Assistant Fire Chief, Career/Volunteer
5. Battalion Chief, Career/Volunteer
6. Volunteer Company Chief

[Footnote 8 of the Court’s decision.] https://www.courts.state.md.us/sites/default/files/unreported-opinions/0614s19.pdf

1-61

NY: CA WOMAN SUPPORTS STRONG IMMIGRATION – CAN SUE TV COMMENTATOR - FALSE TWEETS TO 1.24 MILLION

On July 15, 2020, in Roslyn La Liberte v. Joy Reid, the U.S. Court of Appeals for Second Circuit (New York City) held that the defamation lawsuit will be reinstated; the defendant, Joy Reid, an MSNBC commentator, sent Tweet to 1.24 million followers, falsely alleging Ms. La Liberte threatened 14-year-old Hispanic boy at a Simi Valley Council Meeting. La Liberte received hate mail, including threats of mutilation and recommendations she commit suicide. Court wrote: “In effect, Reid is arguing [in this Appeal] that a plaintiff can sue only the first defamer. If that were so, a post by an obscure social media user with few followers, blogging in the recesses of the internet, would allow everyone else to pile on without consequence. No one’s reputation would be worth a thing.”

https://www.ca2.uscourts.gov/decisions/isysquery/2a455a3a-04be-4845-88fb-6da61a7004cf/1/doc/19-3574_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/2a455a3a-04be-4845-88fb-6da61a7004cf/1/hilite/

Legal Lessons Learned: Fortunately, the Court also held that plaintiff is not a “public official” and she does not need to prove defendant posted with actual “malice.”

Note: The 2nd Circuit held that Joy Reed was also not protected by California Anti-SLAPP statute, which helps protect news organizations, reporters, journalists, other from defamation lawsuits.

https://www.rcfp.org/resources/anti-slapp-laws/

The 2nd Circuit held: “As a matter of first impression in this Circuit, we hold that California’s anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff’s burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56.”
Courts have held that Fire Chiefs are “public officials” and must prove actual malice in defamation lawsuits.  

**PA: CHILD DIED NEIGHBOR’S SWIMMING POOL – INWARD GATES – CODE OFFICIAL WAS NOT EMPLOYEE – STILL HAS GOV’T IMMUNITY**

On July 9, 2020, in *Anna Oakes, Administratrix of Estate of Pheylan Marine Cline v. Jeff Richardson and Richardson Inspection Services, LLC*, the Commonwealth Court of Pennsylvania, held (3 to 0) in an unreported decision that the trial court properly granted summary judgment to the defendants, since Jeff Richardson enjoyed governmental immunity. The Court wrote: For these reasons, we conclude that the trial court correctly determined that Richardson acted on behalf of the Township as an ‘employee’ and as such is entitled to governmental immunity under the Tort Claims Act.”  

Legal Lessons Learned: Tragic death of 20-month old; what is the Code requirement in your community for gates protecting an above-ground swimming pool?

**AR: ARSON OF APARTMENTS – FINANCIAL FRAUD INVEST – DEFENDANTS CAN’T DEPOSE TUCSON FD INSPECTOR**

On June 30, 2020, in *Greg Moore & Patricia Moore v. Sean Garland, et al.*, U.S. District Court Judge Rosemary Marquez, District of Arizona, upheld the decision of the U.S. Magistrate Judge that two defendants arrested and awaiting trial, cannot use a civil lawsuit under 42 USC 1983 to take the deposition of the Tucson FD arson investigator, even after they received his report, since there is an ongoing financial fraud investigation. Likewise, they cannot subpoena police department records that had been provided to insurance company investigators, or PD documents shared with IRS investigators. The District Court Judge agreed with the U.S. Magistrate, and held: “The [Magistrate’s] Order notes that the City previously disclosed to Plaintiffs TFD Inspector Loya's fifteen-page report on the Forgeus fire … and holds, contrary to Plaintiffs' arguments, that ‘in the context of the law enforcement privilege, the 'release of a document only waives the privilege for the document or information specifically released, and not for related materials.’”  
[https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZsoxzsfdSpYQWUHrz4LGn9%2B%2B5efEeYPRxdC77jaiEbw](https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZsoxzsfdSpYQWUHrz4LGn9%2B%2B5efEeYPRxdC77jaiEbw)

Legal Lesson Learned: The “law enforcement investigatory privilege” prevents defendants awaiting trial to use a civil lawsuit to obtain ongoing investigation records.
NY: QUALIFIED IMMUNITY – HOT TOPIC FOR CONGESS - NYPD USED TASER TWICE – $30,000 PUNITIVE DAMAGES

On June 26, 2020, in Matthew Jones v. Lieutenant Christopher Treubig, the U.S. Court of Appeals for the Second Circuit [NYC], held 3 to 0, that the U. S. District Court improperly set aside the jury verdict since the Lieutenant’s conduct of using taser twice on a suspect held by other officers on the ground was a clear constitutional violation. “In sum, upon a review of the relevant legal authority, we hold that it was clearly established as of April 2015 that a police officer cannot use significant force, such as a taser, against an individual who is no longer resisting or posing a threat to the officers or others.” https://www.ca2.uscourts.gov/decisions/isysquery/93d429af-6bc3-4a16-b287-422f5179acac/1/doc/18-3775_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/93d429af-6bc3-4a16-b287-422f5179acac/1/hilite/

Legal Lessons Learned: The “qualified immunity” doctrine has protected not only police officers, but also fire & EMS from personal liability, with many lawsuits being dismissed prior to trial. In litigation in federal court, and in many states, if the trial judge denies the motion to dismiss, there normally can be an immediate appeal by the public employee and employer to the Court of Appeals [in this case a pre-trial motion was apparently not filed].

Note: Following the death of George Floyd in Minneapolis, Congress is current considering enacting several bills to either amend or virtually eliminate the qualified immunity doctrine. See article, June 19, 2020, “Republican rift opens up over qualified immunity for police.” https://thehill.com/homenews/senate/503496-republican-rift-opens-up-over-qualified-immunity-for-police

1-57

MI: QUALIFIED IMMUNITY – DENIED UNIV. OF MICH. FOOTBALL GAME - “DRUNK” FAN – PD EXCESSIVE FORCE

On June 24, 2020, in Bryan Richards v. County of Washtenaw, et al. & Justin Berent, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that the arresting officers enjoy qualified immunity for their arresting the fan for assaulting the uniformed medic in football stadium’s medical office, but the lawsuit may proceed for excessive force. The 6th Circuit held: “Richards says he was never told he was under arrest and there was not enough time for him to have resisted the officers as they immediately converged on him upon entering the medical area. Berent acknowledges that he did not order Richards to stop before moving in for the arrest; and while Berent stated that he told Richards to ‘stop resisting’ several times before the officers took Richards to the ground, Richards denies this fact. Richards further testified that, while he was on the ground, he could not comply with any commands to place his hands behind his back as his arms were pinned beneath him.” https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0374n-06.pdf

Legal Lessons Learned: Consider installing video cameras in the football stadium medical office.
OH: TWO ARSON INVEST. TESTIFIED CAUSE & ORIGIN – STRONG CASE – TRIAL JUDGE ALLOWED TESTIFY WITHOUT FIRST BEING QUALIFIED AS “EXPERT WITNESSES”

On June 3, 2020, in State of Ohio v. Jauvaughn Penn, the Court of Appeals Ninth Judicial District (Summit County), 2020 Ohio 3158, held (2 to 1) that defendant’s jury conviction of aggravated arson and burglary was affirmed. The Court of Appeals (2 judge majority) focused on the strength of the evidence against the defendant, and concluded trial judge did not abuse his discretion in allowing two Akron fire investigators to testify without being first qualified as experts. “[L]ay opinion testimony is admissible so long as it is ‘rationally based on the perception of the witness’ and ‘helpful to a clear understanding of [his] testimony or the determination of a fact in issue.’” Evid.R. 701. This Court reviews for an abuse of discretion a trial court's decision to admit lay opinion testimony under Evid.R. 701. A trial court may be found to have abused its discretion if it rules in an unreasonable, arbitrary, or unconscionable manner. Blakemore, 5 Ohio St.3d at 219.”


Legal Lessons Learned: Whenever possible, it is best for prosecutors to have the trial court qualify Arson investigators as expert witnesses and provide a written report to the defense prior to trial.

Note: One of three judges on the Court of Appeals wrote a partial dissenting opinion.

“I respectfully dissent in regard to the majority’s resolution of the first assignment of error as I would conclude that the trial court abused its discretion when it permitted Mr. Hoch and Mr. D’Avello to give expert testimony at trial. *** Mr. Hoch and Mr. D’Avello expressed definitive opinions on the origin of the fire. These opinions were largely predicated on an understanding of charring levels and burn patterns on the walls. Testimony regarding the origin of a fire based on analysis of charring levels and burn patterns observed during a visual inspection frequently falls within the purview of expert testimony.”

1-55

NY: PHOTO OF KNEELING FDNY FIREFIGHTER DURING 911 RECOVERY – PROF. PHTOGRAPHER COPYRIGHTED PHOTO – COMPANY MUST PAY USE ON SWEATSHIRTS, TEE SHIRTS

On May 28, 2020, in Matthew McDermott v. NYFirestore.com, Inc., U.S. District Court judge Alison J. Nathan, Southern District of New York, held that the plaintiff, a professional photographer, has provided the Court with the photograph’s Certificate of Registration, and is granted a default judgment for liability against NYFirestore company for unauthorized use of the photo on sweatshirts, tee shirts and throw blankets. Plaintiff seeks $20,000 in actual damages; under the Digital Millennium Copyright Act the photographer must now show he placed a digital watermark or other “copyright management information” on the photo; has 30 days to file motion for damages and attorney fees, with evidence of licensing fees he has charged others for use of his photos.

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZgQb9URzc30c5cCnjaV%2BywxWbGQAvcBjQKWk6ijxjSD1
Legal Lessons Learned: In order to help protect copyrighted photos, add a copyright watermark pattern to the photo.

Note: See this article, “Add A Copyright Watermark Pattern To A Photo With Photoshop,” https://www/photoshopessentials.com/photo-effects/copyright/

1-54

OR: FALSE 9-1-1 CALLS – FOUR CALLS, FEMALE DEF. CLAIMED ANOTHER FEMALE WAS REPEATEDLY STALKING HER – “SCREENSHOTS” GOOGLE MAPS PROVED SHE LIED

On May 28, 2020, in State of Oregon v. H.D.E., 304 Or App 375, the Court of Appeals of the State of Oregon held (3 to 0) upheld her convictions, holding that trial judge properly allowed the screenshots into evidence, and State proved that claims by defendant that Ms. Garcia was stalking her were false. https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/26716/rec/1

Legal Lessons Learned: New technology, such as cell phone screenshots, can be powerful proof in a trial.

1-53

IA: FF ARSONIST – SEARCH WARRANTS GPS TRACKER / CELL PHONE LOCATIONS – PLEA DEAL, COOPERATE, NO OTHER CHARGES - BUT INDICTED 4 MORE ARSONS, DISMISSED

On May 15, 2020, in State of Iowa v. Chance Ryan Beres, the Iowa Supreme Court held (7 to 0) that the State is bound by its plea agreement, and cannot bring four additional arson charges. https://www.iowacourts.gov/courtcases/9747/embed/SupremeCourtOpinion

Legal Lessons Learned: Prosecutors should not agree to a plea agreement until the defendant has been thoroughly interviewed, and also given a complete, written statement about all his arsons.
KS: ARSON - 71-YR-OLD WOMAN, HOUSE FORECLOSURE – ARSON INVESTIGATOR INTERVIEWED HER 2-HOURS IN HOSPITAL – MIRANDA WARNING NOT REQUIRED, NOT IN CUSTODY

On May 8, 2020, in State of Kansas v. Patricia E. Sinclair, the Court of Appeals of State of Kansas, held (3 to 0) in unpublished opinion, that trial judge properly denied her motion to suppress the tape recorded interview. “Thus, looking at the totality of the circumstances, we find Sinclair's interview was not a custodial interrogation.”

https://www.courtlistener.com/pdf/2020/05/08/state_v._sinclair.pdf

Legal Lessons Learned: Non-custodial interviews do not require a *Miranda* warning. One technique is to start interview by informing person that it is an “investigative interview” and they are not in custody.

1-51

U.S. SUP. CT: NJ GOV STAFF SHUT DOWN LANES GW BRIDGE – POL. “BACKBACK” MAYOR FT. LEE – FED. CONVICTIONS PROGRAM FRAUD & WIRE FRAUD REVERSED

On May 7, 2020, in Bridget Anne Kelly v. United States, et al., the U.S. Supreme Court (9 to 0) held that convictions of Ms. Kelly, Deputy Chief of Staff of New Jersey Governor Chris Christie, and William Baroni, Deputy Executive Director of tri-state Port Authority, were reversed. Justice Elana Kagan, writing for unanimous Court, wrote: “But not every corrupt act by state or local officials is a federal crime. Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws.”


Legal Lessons Learned: Public corruption is a common issue; Fire & EMS must be extremely careful in expending funds for only public purposes [classic case of using fire engine to fill a politician’s pool can result in state criminal charges].

1-50

FL: POLICE CANINES – BOTH ALERTED BODY ODOR IN CAR - MURDER CONVICTION UPHELD - *DAUBERT* STANDARD
On April 22, 2020, in Cid Torrez v. State of Florida, the District Court of Appeal of the State of Florida (Fourth District), held (3 to 0) that the trial court properly allowed two police detectives and an expert witness to testify that the dogs alerted to human body odor in trunk of defendant’s vehicle. The defendant was convicted of murder of his wife, even though her body was never discovered. The Court found canine evidence admissible under the Daubert standard [U.S. Supreme Court’s decision in Daubert v. Merrell Dow Pharmaceuticals (92-102), 509 U.S. 579 (1993)]. Judge Mark W. Klingensmith, in his decision for the Court, cited Bob Dylan song:

“The evidence of the reliability of a dog’s alert is “readily understood by a jury.” … Or as Bob Dylan once said, “you don’t need a weatherman to know which way the wind blows.” BOB DYLAN, Subterranean Homesick Blues, on BRINGING IT ALL BACK HOME (Columbia Records 1965).
https://www.courtlistener.com/opinion/4747432/cid-torrez-v-state-of-florida/

Legal Lessons Learned: The Daubert standard must be met for expert testimony, including testimony by canine handlers.

Note: The U.S. Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), involved a lawsuit alleging that birth defects might have been caused by pregnant women taking Bendectin for anti-nausea. The federal judge granted summary judgment to Merrell Dow, finding plaintiff’s expert testimony was not based on medical studies of humans, but based “upon ‘in vitro’ (test tube) and ‘in vivo’ (live) animal studies that found a link between Bendectin and malformations.”
https://www.law.cornell.edu/supct/html/92-102.ZO.html. The Supreme Court remanded the case, and directed the judge to decide if the plaintiffs’ experts met Rule 702 of the Federal Rules of Evidence, which provides (in part):

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise....”

The U.S. Supreme Court applied those standards in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), involving steel belted radial tire on a minivan, where passenger was killed. The Court rejected the plaintiff’s tire expert: “Applying these standards, we determine that the District Court’s decision in this case—not to admit certain expert testimony—was within its discretion and therefore lawful.”
https://scholar.google.com/scholar_case?case=11404623739922196630&q=Kumho+Tire+Co.+v.+Carmichael&hl=en&as_sdt=6,36&as_vis=1

1-49

MN: ARSON – HOMEOWNER INTENTIONALLY SET FIRE - 41 MONTHS PRISON – TRIAL JUDGE REJECTED PROBATION - KILLED DOG, LIED INVESTIGATORS, INSURANCE FRAUD

On April 13, 2020, in State of Minnesota v. Jeffrey George Ackerson, Jr., the State of Minnesota Court of Appeals, held (3 to 0) that the trial judge did not abuse his discretion in refusing to impose a reduced sentence.
Legal Lessons Learned: Minnesota uses presumptive sentencing guidelines; the trial court wisely rejected the public defender office “dispositional advisor” recommendation of probation.

1-48

U.S. SUP. CT: CRIMINAL CONV. MUST BE UNANIMOUS JURY – LOUISIANA, OREGON 10-2 UNCONSTITUTIONAL

On April 20, 2020 in Evangelisto Ramos v. Louisiana, the U.S. Supreme Court (6 to 3) set aside prior court precedent from 1972, overturned Ramos’s conviction for second-degree murder, and life imprisonment. Six Justices agreed on setting aside the conviction, but 4 of the 6 wrote concurring opinions outlining different legal reasoning. Louisiana and Oregon are the only states allowing convictions on less than unanimous verdicts (implemented in Louisiana in 1898 out of concern about African American jurors on jury; Oregon in 1930s implemented out of concern of KKK members getting on jury). Louisiana in 2019 started requiring unanimous verdicts for crimes committed in 2019 or later. Presumably they will re-try Ramos (an oil-supply boat worker, who admitted having consensual sex with 43-year old Ternice Fedison the night before her body was stuffed into a garbage can).

“No what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is Reversed.” [https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf

Legal Lessons Learned: Our Nation will now be uniform – unanimous jury verdicts will be required to convict (or to acquit).

1-47

OH: FIRE CODES - TWO FIRES AT RECYCLING CENTER – LARGE PILE OF CONSTRUCTION DEBRI - INJUNCTION

On April 16, 2020, in State ex rel. Yost v. Baumann's Recycling Ctr., L.L.C., 2020-Ohio-1504, the Ohio Court of Appeals for Eight Appellate District (Cuyahoga County), held (3 to 0) that the trial court properly issued an
On June 13, 2019, the trial court granted Ohio Attorney General’s lawsuit seeking an injunction, after a bench trial.

“Here, the evidence of record indicated that the disputed pile of C&DD materials had not decreased in size since 2011. The judge properly found that this was not temporary. Further, the evidence demonstrated that the material was producing steam vents from active decomposition, so the court could properly conclude that the material was not ‘substantially unchanged’ or ‘retrievable.’ Therefore, the court did not err in rejecting BRC’s claim that it simply engaged in permissible storage in connection with its ‘processing’ of C&DD within the facility exclusion from the requirements for C&DD ‘disposal’ set forth in R.C. Chapter 3714.”


Legal Lessons Learned: The FD wisely called in the Ohio EPA, and when the owner did not promptly act to remove the fire hazard, the Ohio AG obtained an injunction.

Note: See article, Jan. 27, 2020: “Garfield Heights Recycling Center Held in Contempt of Court for Failing to Address Hazard,”


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**DC: JUROR’S PRE-TRIAL FACEBOOK POSTS - ANTI-TRUMP POSTS – CONVICTION UPHELD - NOT ABOUT DEFENDANT**

On April 16, 2020, in United States v. Roger Stone, Jr., U.S. District Court Judge Amy Berman Jackson denied the defense motion for new trial. On the pre-trial Jury Questionnaire, the juror [she became foreperson of the jury] was asked about any social media posts the jury may have posted about the House of Representatives’ investigation of President Trump. The juror truthfully wrote: “I can’t remember if I did, but I may have shared an article on Facebook. Honestly not sure.” The Court denied the motion: “The motion is a tower of indignation, but at the end of the day, there is little of substance holding it up.”

“The defendant has not shown that the juror lied; nor has he shown that the supposedly disqualifying evidence could not have been found through the exercise of due diligence at the time the jury was selected. Moreover, while the social media communications may suggest that the juror has strong opinions about certain people or issues, they do not reveal that she had an opinion about Roger Stone, which is the opinion that matters.”

https://drive.google.com/file/d/1VWwIseEl7gdzhv6UxgyZNZeTX7Y_8m_/view

Legal Lessons Learned: Juror’s use of social media is not a basis for setting aside the verdict, unless the posts deal with the case on which they are serving.
IA: FIRE INVESTIGATION - TOASTER FIRE – STATE FARM INSURANCE PROPERLY REFUSED PAY HOMEOWNER

On April 6, 2020, in Bryan Jones and Sarah Jones v. State Farm And Casualty Company, U.S. District Court Judge Leonard T. Strand, Chief Judge, U.S. District Court for the Northern District of Iowa, Western Division, granted summary judgment to State Farm and dismissed the lawsuit. The insurance company refused to pay for the fire damage when evidence showed that paper was put in the toaster, it was turned on and a roll of paper towels was left on top of the toaster. Former co-workers of Sarah Jones also informed State Farm about suspicious comments.

“In short, there is undisputed evidence that the fire started at the toaster, that a paper-like material was observed on top of the toaster after the fire and that the toaster was in the ‘on’ position. There is also unrebutted expert opinion evidence that a defect in the toaster, or in the home’s electrical system, could not have caused the fire and that the fire could have been started by putting paper products in and on the toaster. On this record, and regardless of plaintiffs' denials, no reasonable jury could find that the fire was accidental. As such, and as a matter of law, State Farm did not breach the insurance contract by denying coverage for the loss that resulted from the fire.”

https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZiMSkjeFjM9WB95jitKYLwuiXut%2FEoidjwwdPtdsEj9z

Legal Lessons Learned: Insurance companies wisely use experts to investigate suspicious claims. The U.S. District Court judge added this footnote at the end of his decision about prior arson conviction of Bryan Jones.

Footnote 4: “Plaintiffs dispute the admissibility of certain other evidence State Farm discovered during its investigation. For example, plaintiffs were experiencing serious financial difficulties, Bryan has a prior arson conviction, Sarah had submitted a prior fire loss claim and Bryan had once reported a vehicle stolen but it was located a short distance away and had been set on fire…. It is not necessary to consider this evidence to conclude that plaintiffs have failed to meet their burden of producing evidence from which reasonable jurors could find that the fire was accidental or that they did not intentionally start the fire. As such, I need not resolve the admissibility issue. I do note that evidence of these additional facts would almost certainly be relevant, at minimum, for purposes of determining whether State Farm acted in bad faith in denying coverage, if that claim could otherwise proceed to trial.”

1-44

U.S. SUP. CT: POLICE USED “COMMON SENSE” – DRIVER WITH REVOKED LICENSE - REASONABLE SUSPICION

On April 6, 2020, in Kansas v. Charles Glover, Jr., held (8 to 0) in an opinion by Justice Clarence Thomas that the Deputy Sheriff on patrol, who runs a license plate and learns owner of vehicle has revoked driver’s license, used his “common sense” and had “reasonable suspicion” to make a traffic stop of the male driver. The trial judge had granted defense motion to suppress, which the Court of Appeals reversed. The Kansas Supreme Court, however, agreed with the trial judge, finding the Deputy Sheriff did not have reasonable suspicion because his inference that
Glover was behind the wheel amounted to “only a hunch.” Fortunately the U.S. Supreme Court reversed the Kansas Supreme Court.

“Because it is a ‘less demanding’ standard, ‘reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause.’ Alabama v. White, 496 U. S. 325, 330 (1990). The standard ‘depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’ Navarette, supra, at 402 (quoting Ornelas v. United States, 517 U. S. 690, 695 (1996) (emphasis added; internal quotation marks omitted)). Courts “cannot reasonably demand scientific certainty . . . where none exists.” Illinois v. Wardlow, 528 U. S. 119, 125 (2000). Rather, they must permit officers to make ‘commonsense judgments and inferences about human behavior.’ Ibid.”

https://www.supremecourt.gov/opinions/19pdf/18-556_e1pf.pdf

Legal Lessons Learned: Excellent “common sense” decision.

1-43

CA: FIRE INVESTIGATION - HOMEOWNER CONFESSED - PROS. DELAYED DISCLOSURE OF LAB RECEIPTS – NO HARM

On April 3, 2020, in The People v. Lincoln Testro Smith, the Court of Appeal of California (Second Appellate District / Division Five) held (3 to 0) in an unpublished decision, that trial court properly refused to instruct the jury about late disclosure of 75 pages of lab receipts, since the disclosure the night prior to the second (and last) day of trial was made prior to the LA County Sheriff’s senior criminalist’s testimony, did not cause any harm to the defense. Defense already had his two page report, and did not request a continuance of the trial.

“[T]he prosecution’s explanation for the discovery delay offered at trial did not reveal any willful misconduct. And most importantly, the defense was unable to articulate any concrete disadvantage occasioned by the production of the data and notes underlying West’s [Michael West, a senior criminalist with the Los Angeles County Sheriff’s Department, two page] summary report (which had been timely produced) before West testified.” https://www.courts.ca.gov/opinions/nonpub/B294627.PDF

Legal Lessons Learned: Defense counsel is entitled to expert reports, and lab receipts, prior to trial. In this case, was no continuance requested, and no harm.

1-42

On March 23, 2020, in Tom Cotton v. Patrick Connor, Fire Chief, City of Newark Fire Department, the Court of Appeals for Licking County, Fifth Appellate District, 2020-Ohio-1129, held (3 to 0), that the Ohio Board of Building Appeals, and a Common Pleas trial judge, properly denied the appeal of the building owner. Citations included water flow alarm devices not functioning or disconnected; no fire extinguishers in common hallway; marked exit door with flush bolt locks; holes in fire-rated or resistant construction on floors, walls and ceilings.

“We concur with the trial court's decision. Between the first inspection date of August 3, 2017, and the first citation date of September 19, 2017, appellant had forty-seven days to correct the violations. As for the second citation, appellant had fifteen days to correct the violations from the last inspection date (March 26, 2018) to the issuance of the citation (April 10, 2018). According to the Timeline and Summary of the Inspections outline, appellee worked with appellant from July 2017 through April 2018 to correct the fire code deficiencies on the subject property. As of the October 30, 2018 hearing date, outstanding violations existed and some of the corrective measures were in question. We do not find testimony from a ‘representative from the Building Code Enforcement for the City of Newark’ was necessary. Appellant's Brief at 6. Upon review, we find a preponderance of reliable, probative, and substantial evidence to support the trial court's decision. The trial court did not abuse its discretion in affirming the decision of the board of building appeals.”  https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2020/2020-Ohio-1129.pdf

Legal Lessons Learned: Well documented code violations.

See Oct. 14, 2019 article about this property: “Long saga of downtown Newark Arcade property may be near resolution.” “A year ago, the Ohio Board of Building Appeals upheld violations from April 10, 2018, and Sept. 19, 2017. For the April violations, the board issued Cotton a one-time penalty of $9,000, and an additional $9,000 per month if all violations were not remedied in 60 days. For the 2017 violations, the board issued a one-time penalty of $6,700 and $6,700 per month if violations remained after 60 days. The 2018 violations included: water flow alarm devices not functioning or disconnected; no fire extinguishers in common hallway; marked exit door with flush bolt locks; holes in fire-rated or resistant construction on floors, walls and ceilings.” https://www.newarkadvocate.com/story/news/2019/10/14/downtown-newark-arcade-saga-may-nearing-some-resolution-not/3924621002/

1-41

NY: ARSON – ADULT / 3 CHILDREN KILLED – CONVICTIONS – BUT CHARGES LATER DROPPED ONE MAN – ATF AGENTS HAVE IMMUNITY


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In short, Plaintiff's criminal case was fully managed by the federal prosecutors, who independently interviewed all relevant witnesses and then decided to bring charges against Plaintiff. There is no evidence that the ATF Defendants withheld relevant evidence from the prosecutors, or provided false evidence to them, as would be necessary to establish that the ATF Defendants were responsible for initiating or continuing the prosecution. As such, the ATF Defendants are entitled to summary judgment because Plaintiff failed to satisfy the first element of his malicious prosecution claim. See Battisti v. Rice, No. 10-cv-4139, 2017 WL 78891, *10 (E.D.N.Y. Jan. 9, 2017) (dismissing the plaintiff's malicious prosecution claim because "[t]here is no evidence that either officer importuned [the prosecutor] to prosecute Plaintiff or that either officer fabricated or withheld evidence from [the prosecutor]") (citation omitted); Stukes v. City of New York, No. 13-cv-6166, 2015 WL 1246542, *9 (E.D.N.Y. Mar. 17, 2015)."

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZj1n7kcpr8halXGGcU2zGib4k7w6DLSXX7%2BQNj%2B4S4J7

Legal Lessons Learned: ATF and other arson investigators enjoy qualified immunity; the fact that charges were later dropped by prosecutors against a person does not give the individual a right to sue the investigators.

1-40

**TX: GRANDMOTHER’S 911 CALLS DID NOT GO THROUGH – BABY DIED – T-MOBILE HAS IMMUNITY UNDER STATE LAW**

On Feb. 27, 2020, in Bridget Alex v. T-Mobile USA, the U.S. Court of Appeals for 5th Circuit (New Orleans) held (3 to 0) that T-Mobile enjoys immunity under State statute.

“Seven-month-old Brandon Alex was injured after falling from a daybed. His babysitter dialed 9-1-1 three separate times, and stayed on an unconnected line for over thirty minutes. Unable to connect to a dispatcher, Brandon’s grandmother drove him to an emergency room over an hour after the first 9-1-1 call. Brandon was pronounced dead shortly after arriving at the hospital. *** This court has already held that, under the Supreme Court of Texas’s decision in City of Dallas v. Sanchez, 494 S.W.3d 722 (Tex. 2016), Plaintiffs failed to allege proximate cause sufficient to overcome T-Mobile’s immunity…. Because T-Mobile and T-Systems are immune under Texas law, the district court did not err in dismissing Plaintiffs’ claims against them—we affirm.

http://www.ca5.uscourts.gov/opinions/unpub/19/19-10878.0.pdf

Legal Lessons Learned: State statutes often provide immunity to 911 equipment suppliers; this helps avoid suppliers charging municipal governments will large insurance costs.

1-39
**MI: ARSON CASE TO BE RE-TRIED – ARSON INVESTIGATORS CHANGED OPINION – 2 POINTS OF ORIGIN TO 1 LOCATION**

On Feb. 25, 2020, in People of the State of Michigan v. Joshua Mark Burger, the Michigan Court of Appeals held (3 to 0) that the defendant must re-tried. Two arson investigators also changed their opinion from two points or origin to one, but not disclosed to defense until first day of trial. Also, defendant owned a successful pawn shop, and the trial court improperly prohibited him from calling two witnesses who would testify his pawn shop was financially doing well – insurance adjustor, and the landlord.

“Defendant’s primary theory of the case was spontaneous combustion of the rag soaked with linseed oil that he had been using to finish a guitar in the days leading up to the fire, as he argued in closing. ***

It is undisputed in this case that defendant learned for the first time at trial that the fire chiefs had changed their opinion regarding the fire’s point of origin. In their original reports, which were disclosed to defendant, both chiefs opined that the fire had two points of origin. However, the chiefs later altered their conclusions, indicating that indeed, the fire had a single point of origin. We conclude that this information was suppressed, as it was not disclosed until the beginning of trial, and that it was material to defendant’s case.”


**Legal Lessons Learned:** Prosecutors must disclose, prior to trial, when arson investigators change their findings from two points of origin to one point.

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**CA: HOUSE EXPLOSION – HASHISH OIL – AFTER FIRE OUT, HAZMAT CAPT. / PD LATER SEARCHED WITHOUT WARRANT**

On Jan. 28, 2020, in United States of America v. Joseph Jay Spadafore, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (3 to 0, unpublished decision) that trial judge properly denied his motion to suppress evidence; it was reasonable for a fire department Captain and police officers to conduct the later search the home without a search warrant, due to presence of hazardous and volatile materials.

“[E]xigent circumstances involving the explosion of volatile materials used for manufacturing hashish oil justified the search of the residence by fire department personnel and law enforcement officers. During the initial search for potential victims of the explosion, first responders observed ‘glassware, tubing, jars, and other equipment that resembled a drug lab.’ Later in the night, a fire captain with the ‘hazardous materials unit’ accompanied law enforcement officers, while wearing ‘air monitoring devices . . . in order to check the air quality and confirm the nature of the lab inside the home, particularly whether it involved hazardous materials that could pose a danger to life, property, or the environment.’ Although the fire had been extinguished, it was reasonable for fire department personnel and law enforcement officers to search the property due to the explosion and the presence of other hazardous and volatile materials.”

Legal Lessons Learned: Great decision; remember to keep a firefighter at the scene while waiting for HAZMAT, fire investigator, or other specialized resources to arrive.

1-37

FL: FIRE CHIEF – CODE ENFORCEMENT / 100-YR OLD LODGE WAS CONDEMNED – FIRED – 1st AMENDMENT CASE DISMISSED

On Dec. 12, 2019, in Bradley Batz v. City of Sebring, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the U.S. District Court judge had properly dismissed his First Amendment lawsuit, despite his claims of retaliation for his lawful efforts to condemn a 100-year old Lodge, partially owned by a member of City Council.

“In other words, one of Batz’s core responsibilities as the City employee responsible for enforcing the Safety Code was ensuring public safety. Thus, his continued assertion that his speech was motivated by a concern for public safety does not remove it from the realm of employment-related speech…. At the very least, he made no effort to communicate his safety concerns to the public or otherwise communicate with anyone outside other government officials…. Accordingly, we conclude Batz spoke in his role as a City employee when he expressed concerns about efforts to undermine and delay his enforcement efforts against the Lodge. His speech therefore was not protected by the First Amendment. https://cases.justia.com/federal/appellate-courts/ca11/19-11399/19-11399-2019-12-12.pdf?ts=1576184426

Legal Lessons Learned: Fire Chiefs are other public employees have only limited First Amendment rights under the “balancing test.” The Court also dismissed his Florida Whistleblower claims because he did not submit a “written and signed complaint.”

1-36

VA: HYDRANT NEAR HOUSE OUT OF SERVICE – 1000 FOOT LAY – PERSON DIED – GOVERNMENTAL IMMUNITY, CASE DISMISSED

On Dec. 12, 2019, in Sam Massenburg, Administrator of the Estate of Corey Demetrius Massenburg, Deceased v. City of Petersburg, the Supreme Court of Appeals of Virginia, held that the Circuit Court judge properly granted summary judgment to the City.

“A fire hydrant, as the name suggests, exists to facilitate the firefighting function of the municipality that installed it. That function is quintessentially governmental. That fire hydrants can be put to other uses is inconsequential because the sole reason municipalities undertake the expense of installing fire hydrants is to
promote their ability to respond to fire emergencies. *** The City’s provision and maintenance of fire hydrants is therefore an immune governmental function. https://cases.justia.com/virginia/supreme-court/2019-190071.pdf?ts=1576159671

Legal Lessons Learned: Governmental immunity is recognized in Virginia, and protects the city when performing services that are not provided by private companies.

1-35

**OH: ARSON CONVICTION UPHELD – FIRE IN 3 LOCATIONS – FRESH GASOLINE – DIRECT & CIRCUMSTANTIAL EVIDENCE**

On Dec. 12, 2019, in State of Ohio v. Gina M. Huler, the Ohio Court of Appeals for the 8th District (Cuyahoga County), held (3 to 0) that there was sufficient direct and circumstantial evidence for the trial judge to find her guilty of aggravated arson.

“[Jeff] Koehn [Ohio Fire Marshal investigator] also determined that three separate fires were set in three separate locations in the house and a fourth was attempted, but failed to erupt. In support of his determination, Koehn discussed in detail three distinct fire patterns, which had no connection to each other and did not spread across the ceiling as a normal house fire would spread. A determination that there were three separate and distinct fires, with no connecting patterns, serves to eliminate the notion that sparks from the masonry work completed earlier that day could have gone down the chimney, into the house, and started the fire. *** The debris from the trash can on the stairs tested positive for acetone; debris from the attic tested positive for gasoline, and the plastic water bottle tested positive for gasoline. The forensic lab report also indicated the gasoline was fresh, not weathered or aged gasoline. *** Further, although the fire investigation determined that the cause of the fire was classified as incendiary and was intentionally set by Huler, we could arrive at the same conclusion using only circumstantial evidence. ‘Circumstantial evidence and direct evidence inherently possess the same probative value.’ Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.”

Legal Lessons Learned: Expert testimony by State Fire Marshal investigator who “meticulously” eliminated other causes, and laboratory tests confirming gasoline, led to this conviction.

1-34
WA: ARSON – DEFENSE EXPERT FAILED TO FOLLOW NFPA 921 – TESTIMONY PROPERLY LIMITED – SENTENCED TO LIFE IN PRISON

On Dec. 5, 2019, in State of Washington v. Shelly Margaret Arndt, the Supreme Court of Washington (en banc – all 9 Justices hearing the case) held (8 to 1) that the trial court properly restricted the testimony of the defense expert, Dale Mann (former State Patrol crime lab supervisor and certified arson investigator) for failure to conduct a cause and origin investigation under NFPA 921.

“After a three month trial, a jury found Arndt guilty [in death of her boyfriend] of all crimes as charged by the State. The trial court sentenced Arndt to life without the possibility of parole per RCW 10.95.030(1). CP at 475.

***

Arndt takes issue with the limitations the trial judge placed on Mann's testimony due to the fact that he had not personally conducted a complete origin and cause investigation of the scene…. In placing these limitations on Mann's testimony, the judge clearly stated that her rationale was based on Mann's failure to follow well established scientific methodology:

THE COURT: It is not a problem that he goes to the scene, as [the]defense argues, but it is a problem when he starts to test …. If he were to do an origin and cause, he would need to follow the scientific method and eliminate various hypotheses. Instead by focusing on one area, which seems to be this foosball area, he's taking one hypothesis and testing it. And not eliminating, under the scientific method, the entire scene.


1-33

IN: DRONE – WOMAN FINDS DRONE IN HER YARD – ONBOARD VIDEO SHOWS NEIGHBOR CARRYING DRUGS [also filed, Chap. 4]

On Oct. 24, 2019, in Galen Byers v. State of Indiana, Court of Appeals of Indiana held (3 to 0) that the search warrant was obtained timely, and the trial court properly denied the defendant’s motion to suppress. Criminal case for dealing methamphetamine will now be tried, unless the defendant enters a guilty plea.

“Moreover, while we look at the date of the video footage to determine whether probable cause existed, some lapse can also be accounted for here because [Marcie] Vormohr was in possession of the drone for likely at least one of those days. And, although we acknowledge that the woman in the video handled the alleged substances, the video also shows another individual—a man who Vormohr testified was Byers—
handling the drone moments later in the same and subsequent video recordings. Based on the facts and circumstances before us, we cannot say that a four-day period between the activity and the finding of probable cause renders the warrant constitutionally stale.”
https://www.in.gov/judiciary/opinions/pdf/10241902eft.pdf

Legal Lessons Learned: If you are a drug dealer, be cautious of drones with video cameras.

1-32

**PA: HOUSE FIRE - ARSON SUSPECTED, OWNER BEHIND MORTGAGE – INSUR. CO. PROPERLY DELAYED PAYMENT**


“Because payment of the insurance proceeds negates any breach of contract action, Allstate has paid the policy limits on both the structure and ALE claims, and Plaintiff has not presented any evidence that Allstate has failed to compensate her for lost personal property, Plaintiff’s claim must fail. Plaintiff argues that Allstate breached the insurance contract by failing to pay her claim once it was clear that Allstate could not prove arson. (ECF No. 28 at 9.) Allstate responds that it had a reasonable basis to investigate and delay payment. For the reasons discussed in depth above, Plaintiff has not shown that Allstate did not have a reasonable basis to investigate and delay payment, so this delay cannot form the basis of a breach of contract.”

Legal Lessons Learned: “Red flags” were certainly flying in this case.

1-31

**CA: ARSON - FF TESTIFIED AGAIN GIRLFRIEND – SHE ADMITTED ARSON CAR FIRE – HE WAS NOT ACCOMPlice, NO JURY INSTRUCTION NEEDED**

On Aug. 29, 2019, in *The People v. Crystal Lynn Rothgery*, the Court of Appeal of State of California, Third Appellate District, in an unpublished opinion, denied (3 to 0) her appeal of jury conviction of arson. The trial judge did not need to instructor jury about being suspicious of accomplice testimony since no evidence that her boyfriend [a “wilderness firefighter”] was involved in the car fire. https://www.courts.ca.gov/opinions/nonpub/C087060.PDF
The Court wrote:

“Here, the trial court was not required to instruct the jury sua sponte on accomplice testimony because there was no evidence from which a reasonable jury could find Hoskey was an accomplice. To be an accomplice, one must, ‘act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ (People v. Stankewitz (1990) 51 Cal.3d 72, 90-91.) In arguing Hoskey was an accomplice, defendant cites no evidence to satisfy these elements.”

Legal Lessons Learned: No proof this “wilderness firefighter” was involved in his live-in girlfriend’s arson.

1-30

IL: COMMERCIAL BUILDING FIRE ALARMS MUST GO DIRECT TO 911 DISPATCH – ORDINANCE REQ. ONE PROVIDER UPHELD

On July 15, 2019, in Alarm Detection Systems, Inc. v. Orland Fire Protect District, et al, the U.S. Court of Appeals for 7th Circuit held (3 to 0) that ordinances by several Villages were lawful and no violation of Sherman Antitrust Act.

“ADS worries that without introducing competition against Tyco the alarm-system market will stagnate; Tyco will have little reason to innovate and more flexibility to charge high prices. We are not unsympathetic to the point, in theory. But ADS had its chance at trial to demonstrate to the district court that its alternative methods can work in an RSS system, and it did not. And no one should lose sight of the fact that competition for the exclusive contract is competition.”


Legal Lessons Learned: The Court of Appeals upheld the findings of the U.S. District Court judge, who held a 6-day bench [non-jury] trial, and referenced NFPA 72 and the safety need for an exclusive fire-alarm provider.

1-29

U.S. SUPREME CT: DRUNK DRIVER UNCONSCIOUS – BLOOD DRAW WITHOUT SEARCH WARRANT PERMITTED - EXIGENT CIRCUMSTANCES

On June 27, 2019, in Mitchell v. Wisconsin, the U.S. Supreme Court held (5 to 4), on the defendant’s appeal from decision of the Wisconsin Supreme Court, that when the driver is unconscious, and cannot be given a breath test, they may generally obtain a blood draw at a hospital without a search warrant under the “exigent circumstances” doctrine.

Legal Lessons Learned: Very helpful majority decision, expanding the “exigent circumstances” doctrine, to allow police to rapidly obtain blood draws without a search warrant.

Justice Samuel Alito wrote the majority opinion:

“Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers’ many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.”

IL: SUICIDE - U.S. SUP. CT. NOT TAKE APPEAL – SUICIDE BY ATTORNEY ON ANTI-DEPRESSANTS - FDA DID NOT APPROVE LABEL

On May 28, 2019, in Wendy B. Dolin v. GlaxoSmithKline, LLC, the U.S. Supreme Court declined to hear the appeal of widow of 57-year old attorney who committed suicide after taking Paxil. Thereby leaving in place the decision of the U.S. Court of Appeals for the 7th Circuit, which had set aside $3 million jury verdict for widow. https://www.supremecourt.gov/orders/courtorders/052819zor_2dq3.pdf

On Aug. 22, 2018, the 7th Circuit held that Food and Drug Administration refused to allow the manufacturer to added to Paxil label a warning that the drug may lead to increase in suicide of not only patients under 24, but also in older adults. The FDA wanted the same, uniform warning on all anti-depressant drugs. https://law.justia.com/cases/federal/appellate-courts/ca7/17-3030/17-3030-2018-08-22.html

“GSK asked the FDA for permission to modify the paroxetine label as plaintiff argues was needed. The FDA said no, repeatedly. Federal law thus preempted plaintiff’s Illinois-law claim that GSK should have warned of a risk of adult suicidality on the paroxetine label in 2010. GSK added a similar warning in 2006, and the FDA ordered that GSK remove that label and replace it with a class-wide SSRI warning in 2007.”

Legal Lessons Learned: FDs should have a drug-free workplace policy that requires disclosure of anti-depressant medication that could affect performance of their duties.

See IAFC Position: Drug and Alcohol-Free Awareness, including:
“Any personnel using over-the-counter or prescription medications where potential side effects that may reasonably affect the performance of their duties have been identified by a healthcare provider or manufacturer’s packaging should report their use to their supervisor when they are functioning in a capacity responsible for emergency and non-emergency operations. Upon notification, supervisors should, in the case of prescription medications, direct personnel to obtain appropriate documentation from the prescribing healthcare provider attesting to the medication’s safety while performing the essential duties of the fire service position. In the case of over-the-counter medications, supervisors should contact the fire department physician or other healthcare provider to consult on the potential side effects. Personnel should refrain from engaging in such activities until the appropriate release is obtained.”


1-27

IL: BILLING FOR FD SERVICES – ORDINANCE LAWFUL TO BILL NON-RESIDENTS
On March 28, 2019, in The City of Effingham, Illinois v. Diss Truck & Repair, LLC, the Appellate Court of Illinois - Fifth District, held (3 to 0), that the Fire Department may bill for these services for a non-resident.

“After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature’s intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer’s burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality.”


Legal Lessons Learned: Soft billing of residents deemed lawful.

1-26

IA: STATE SUP. CT. UPHOLDS STATUTE - NO PAYROLL DEDUCT. OF UNION DUES – LIMITED COLLECTIVE BARG. LESS 30% PUB SAFETY
On May 17, 2019, in AFSCME Iowa Council 61, et al. v. State of Iowa and Iowa Public Employment Relations Board, the Iowa Supreme Court held (4 to 3) that the 2017 statute was constitutional.

“Our role is to decide whether constitutional lines were crossed, not to sit as a super legislature rethinking policy choices of the elected branches. We conclude the 2017 amendments withstand the constitutional challenges. The plaintiffs concede there is no constitutional right to public-sector collective bargaining or payroll deductions. The parties agree the equal protection claims are reviewed under the rational basis test. The legislature could reasonably conclude that the goal of keeping labor peace with unions comprised of at
least thirty percent public safety employees, and the greater risks faced by emergency first responders, justified the classification. We hold the legislative classifications are not so overinclusive or underinclusive as to be unconstitutional under our highly deferential standard of review. We further hold the amendments do not violate constitutional rights of freedom of association. Public employees remain free to belong to the same unions. Accordingly, we affirm the district court's summary judgment.”

https://www.leagle.com/decision/iniaco20190517282

Legal Lessons Learned: Collective bargaining for fire & police has been addressed by many state legislatures. The U.S. Supreme Court’s Janis decision on June 27, 2018, “States and public-sector unions may no longer extract agency fees from nonconsenting employees” - may lead other states to also limit employer deduction of union dues. https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

See footnote 4 of the Majority’s decision:

As of 2018, twenty-eight states require collective bargaining. Eric J. Brunner & Andrew Ju, State Collective Bargaining Laws and Public-Sector Pay, 72 ILR Rev. 480, 487 (2019) [hereinafter Brunner & Ju]. Fifteen states allow state employers to decide whether or not to collectively bargain. Id. The range of topics public employees are able to bargain over varies from state to state, as does the employees’ ability to compel arbitration in the event of an impasse. Raskin-Ortiz & Martin at 4-10. Of the states that require or permit collective bargaining, Alabama, Delaware, Idaho, Kentucky, Oklahoma, Rhode Island, and Wyoming have separate bargaining rights for police officers and/or firefighters. Id. Three states—North Carolina, South Carolina, and Virginia—prohibit collective bargaining for any public employees. Brunner & Ju at 487. Arizona and Texas limit collective bargaining to police officers and firefighters, while Georgia limits collective bargaining rights to firefighters alone. Id.

See also this May 16, 2019 article: “Union Dues Deductions – Tips for Public Employers” - https://fisheldowney.com/union-dues-deductions-tips-public-employers/

1-25

TX: APARTMENT FIRE - DRUG PARAPHERNALIA IN “PLAIN VIEW” - PD CALLED IN, SEARCH WARRANT – METH CONVICTION UPHELD

On May 16, 2019, in Casey Allen Martin v. State of Texas, the Court of Appeals of Texas, Second Appellate District (Fort Worth) held (3 to 0) the trial court properly denied the defendant’s motion to suppress the methamphetamine.

“Fire broke out in appellant Casey Allen Martin’s apartment, and firefighters entered to battle the blaze. Firefighters saw drug paraphernalia inside, and they called police in to observe the scene. Officers then obtained a search warrant, which led to the discovery of the methamphetamine that was the basis for Martin’s conviction. In one issue, Martin appeals the denial of his motion to suppress. Martin does not dispute that the fire permitted firefighters to enter the apartment. But he contends that the same exigent circumstances did not also authorize officers to enter and observe, in plain view, the same contraband that firefighters had already seen. Because we disagree, we affirm.

Legal Lessons Learned: The “Plain View Rule” is alive and well. The police probably could have seized the meth and the firearm without a search warrant, but getting the warrant “virtually guaranteed” that a motion to suppress would be denied.

1-24

NY: 911 CALL - ELEVATOR SUDDENLY DROPPED WHILE FDNY AT SCENE – LAWSUIT DISMISSED, “SPECIAL DUTY” RULE

On April 24, 2019, in Daniel Ortiz v. City of New York, et al, the Supreme Court of New York, Appellate Division, Second Department, 2019 NY Slip Op 03062, held (5 to 0) that the lawsuit was properly dismissed by Kings County judge.

“Here, the City defendants were acting in a governmental capacity when the plaintiff was injured during the firefighters' rescue operation (see Kadymir v New York City Tr. Auth., 55 AD3d 549, 552). The inquiry then turns to whether the City defendants owed the plaintiff a special duty (see Applewhite v Accuhealth, Inc., 21 NY3d at 426). Contrary to the plaintiff's contention that no special duty was required, a special duty was ‘an essential element of the negligence claim itself’ (id.). Because the plaintiff concedes that the City defendants owed him no special duty of care, ‘the analysis ends and liability may not be imputed to the City defendants (id.).’” https://law.justia.com/cases/new-york/appellate-division-second-department/2019/2017-01910.html

Legal Lessons Learned: The “special duty rule” protects municipalities when performing a governmental function.

1-23

IL: BILLING FOR FD SERVICES – ORDINANCE LAWFUL TO BILL NON-RESIDENTS, INCLUDING EXTRICATING EMPLOYEE UNDER VEHICLE

On March 28, 2019, in The City of Effingham, Illinois v. Diss Truck & Repair, LLC, the Appellate Court of Illinois - Fifth District, held (3 to 0) that the Fire Department may bill for these services for a non-resident.

“After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature’s intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer’s burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality.”
Legal Lessons Learned: Ordinances authorizing billing of non-residents for fire department services are becoming increasingly common.

1-22

CO: ARSON - $3M LOSS TO HOTEL BEING BUILT– NO SECURITY FENCE, NO INSURANCE


“On summary judgment, the parties seek clarity from this Court on whether, under the Policy, Defendants’ failure to maintain a protective device, a six-foot fence enclosing the entire job site, which was listed in an endorsement and schedule attached to the contract, relieves Praetorian of its obligation to pay for Defendants’ losses due to fire…. For the reasons discussed below, the Court will grant Praetorian’s Motion for Summary Judgment (‘the Motion’), direct entry of judgment, and terminate this case.”

https://cases.justia.com/federal/district-courts/colorado/codce/1:2017cv02034/173671/65/0.pdf?ts=1551517811

Legal Lessons Learned: FDs should encourage owners of large construction sites to enclose the site with fencing and nighttime lights.

1-21

MD: GOVT IMMUNITY – COUNTY 911 SYSTEM DOWN 3 HOURS – RESIDENT DIED

On Feb. 22, 2019, in Raul T. Aristorenas, et al. v. Montgomery County, Maryland, the Court of Appeals of Maryland, held (3 to 0) in unreported decision upheld the dismissal of the lawsuit by Circuit Court trial judge:

“The [trial] court concluded that the allegations did not state a claim for negligence—which underlies both the wrongful death and the survival claims—because the County is immune from suit and the individual defendants did not owe a duty to Mr. Somarriba or Marlon. We agree and affirm.”


Legal Lessons Learned: This is a tragic case – amazing there was no back up system, or ability to have another 911 Center pick up the calls.
U.S. SUPREME COURT: EXECUTION – INMATE NOT ENTITLED TO HAVE IMAM PRESENT IN DEATH CHAMBER

On Feb. 7, 2019, in Jefferson S. Dunn, Commissioner, Alabama Department of Corrections v. Dominique Hakim Marcelle Ray, the majority of Justices [5 to 4] overturned 11th Circuit’s Feb. 6, 2019 stay of execution of Ray, who has raped and murdered a 15-year old girl in 1995. Ray had asked Alabama prison officials to allow an imam to be in the death chamber, but only correction employees are allowed, including a long employed Christian chaplain. [The State of Alabama then executed the prisoner on Feb. 7, at 10:12 pm.]

Legal Lessons Learned: The Supreme Court’s five “conservative” Justices have made it clear that last minute stays of execution are not favored.

See Feb. 7, 2018 article, “Alabama Executes Muslim Inmate Who Wanted Imam Present.” “Ray was convicted in 1999 after another man, Marcus Owden, confessed to his role in the crime and implicated Ray. Owden told police that they had picked the girl up for a night out on the town and then raped her. Owden said that Ray cut the girl’s throat. Owden pleaded guilty to murder, testified against Ray and is serving a life sentence without parole. A jury recommended the death penalty for Ray by an 11-1 vote.”

See Feb. 8, 2019 Washington Post article: “Abortion, Death Penalty, Religion: Late-Night Rulings Show New Alliances At Supreme Court.”

MA: SPRINKLERS - DRUG REHAB HOUSE WITH 8 PATIENTS – COURT UPHOLDS FIRE CODE

On Jan. 29, 2019, in Crossing Over, Inc, et al. v. City of Fitchberg, Justice Rosemary Connelly, MA Superior Court upheld the July 14, 2017 decision of the “Automatic Sprinkler Appeals Board” which held:

“Based upon the aforementioned findings and reasoning, the Board hereby upholds the Order of the Fitchburg Fire Department and requires the installation of an adequate system of sprinklers throughout all portions of the subject building used and/or occupied for boarding or lodging purposes….”

Justice Connelly denied the property owner’s motion to reverse the Board, holding that the Board’s decision is legal, supported by the record, and the Board has not exceeded it authority. The court will give deference
Legal Lessons Learned: Sprinkler ordinances save lives.

1-18

PA: ARSON – DEFENDANT SMELLED OF GASOLINE, TRAINED ARSON DOG ALERTED
On Jan. 11, 2019, in Commonwealth of Pennsylvania v. Jamat Ali Manzoor, the Superior Court of PA (3 to 0) upheld the jury conviction on two counts of arson, and insurance fraud.  

Legal Lessons Learned: Evidence of trained arson K-9 alerting for accelerants to admissible in arson trial.


1-17

U.S. SUPREME COURT: QUALIFIED IMMUNITY FOR POLICE OFFICERS – DOMESTIC VIOLENCE ARREST
On Jan. 7, 2019, in City of Escondido, California v. Mart Emmons, the U.S. Supreme Court (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument.  
The Court held:

“As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ Kisela v. Hughes, 584 U. S. ____ , ____ (2018) (per curiam). The Court of Appeals made no effort to explain how that case law prohibited Officer Craig’s actions in this case.”  https://www.supremecourt.gov/opinions/18pdf/17-1660_5ifl.pdf

Legal Lessons Learned: Great decision on “qualified immunity” for emergency responders.

See also Chap. 13:  Aug. 14, 2018 decision by 7th Circuit in Billie Thompson v. Lance Cope where Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative.  EMS administered a sedative – Versed - patient stopped breathing, and was revived; he ultimately died 8-days later.  The Court held (3 to 0), “The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee’s Fourth Amendment rights by exercising medical judgment to administer a sedative in a
1-16

KY: “RIGHT TO WORK” STATUTE UPHELD; SIMILAR TO U.S. SUPREME COURT DECISION IN Janis

On Nov. 15, 2018, in Fred Zuckerman, As Representative Of The General Drivers, Warehousemen And Helpers Local Union No. 89 v. Matthew G. Bevin, Governor, the Kentucky Supreme Court (4 to 3) upheld the statute:

“we hold that the Unions’ constitutional challenges to the Act are without merit. In this area of economic legislation, the legislature and the executive branch make the policy, not the courts.”


Legal Lessons Learned: Fire & EMS departments, not only in Kentucky, but in all states must now follow the U.S. Supreme Court’s decision, June 27, 2018, in Janus v. American Federation of State, County, and Municipal Employees, Council 31, which held (5 to 4), “Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bar gaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”


See IAFF statement in response to the Janus decision:

General President Harold Schaitberger issued this statement on the Supreme Court 5-4 decision overruling decades of precedent in the case of Janus v AFSCME Council 31:

http://client.prod.iaff.org/#contentid=68451

Washington, DC – “The Janus v AFSCME Council 31 case was pushed by forces that want to take away the voices of fire fighters and the power of all public employee unions. The intent is to handicap unions in our ability to improve members’ lives and to weaken the political power of public employees.

“We know the potential negative impacts that could come from the Supreme Court’s decision in Janus, however we are ready to take the best punch and deliver some blows ourselves to those that want to see fire fighters and their unions weakened.

“We know the potential negative impacts that could come from the Supreme Court’s decision in Janus, however we are ready to take the best punch and deliver some blows ourselves to those that want to see fire fighters and their unions weakened.

While the Janus decision is another attack on organized labor, every attack can be turned into an opportunity, and we are determined not to let this decision hold us back from our important mission. The IAFF has operated successfully under Janus-like rules in right-to-work and non-collective bargaining states for decades. We have proven that you can have strong affiliates that deliver better pay, health care, retirement security, health and safety provisions and a voice in keeping their communities safe in these tough environments.
“We represent more than 85 percent of all professional fire fighters and paramedics in the U.S. because we consistently demonstrate our value, through our strong affiliates, that being union fire fighters provides a significantly better standard of living and safer working environment than those who are not union. We believe that difference will become even more stark, and we are working to represent that small percentage of fire fighters who aren’t in our union so that we can raise their standard of living and increase their ability to have a strong voice in public safety.

“This case was intended as a political push to eliminate the power of people who work to support their families and the power of their unions. But instead, the Janus case is activating an army of union leaders to better engage their members.”

1-15

**WI: FOREST FIRE – INSURANCE COMPANY HAS LIMITED LIABILITY OF $500,000**

On Oct. 30, 2018, in SECURA Insurance, A Mutual Company v. Lyme St. Croix Forest Company, LLC, et al., the Wisconsin Supreme Court reversed the trial court, and the Wisconsin Appeals Court, and held (7 to 0):

“Despite the fact that the fire crossed several property lines, Secura contends it was a single, uninterrupted cause of the alleged damages. *** We conclude that the fire at issue constitutes a single occurrence pursuant to the CGL [Commercial General Liability] policy. Consequently, the $500,000 per-occurrence limit for property damage applies.”


Legal Lessons Learned: The logging equipment company, which paid for insurance against this type of loss, must feel that its insurance company has treated their customer like “manure.” Insurance policies are often difficult to interpret. Fire & EMS departments should invite their liability insurance carrier(s) in for a discussion about what is covered and what is not covered.

1-14

**OH: FIRE CODE VIOLATIONS - COURT MAY ORDER INSPECTION OF UNOCCUPIED BUILDING**

On Oct. 11, 2018, in City of Cleveland v. James Grunt, Jr., the Ohio Court of Appeals for Cuyahoga County held (3 to 0) that a judge on the Cleveland Municipal Court – Housing Division had authority to allow warrantless inspections of the property to confirm that owner is complying with Cleveland Building Department requirements.
“[W]e find no cases in Ohio directly on point, i.e., discussing the constitutionality of ordering a property inspection as a condition of CCS. However, we find guidance in R.C. 2951.02, which authorizes warrantless searches during an offender’s misdemeanor CCS under certain circumstances.”

Legal Lessons Learned: This decision can be helpful precedence in Ohio for communities struggling with empty properties.

1-13

OH: AUTOPSY REPORTS NOT PUBLIC RECORDS – ONGOING INVESTIGATION, BUT JOURNALISTS CAN READ

On Sept. 19, 2018, in The State Ex Rel. Cincinnati Enquirer v. Pike County General Health District, et al., the Ohio Supreme Court held (5 to 0) that:

“the function of R.C. 313.10(D) is to give journalists limited access to records that are not public records. If a journalist could review only autopsy reports that are public records, then he would have no greater access than the general public, and R.C. 313.10(D) would be a dead letter.”

Legal Lessons Learned: The Cincinnati Enquirer may next seek reimbursement of attorney fees. Fire & EMS departments, when requested to produce documents that may not be “public records” (for example, HIPAA-protected EMS run reports), should consult legal counsel before deciding whether to release the documents.


1-12

TX: FREE SPEECH - PD OFFICER LAWSUIT MAY PROCEED - FIRED ORGANIZING POLICE ASSOCIATION [also filed, Chap. 16]

On Aug. 31, 2018, in Marcus Mote v. Debra Walthall, the U.S. Court of Appeals for 5th Circuit held (3 to 0) that Police Chief Debra Walthall is not entitled to qualified immunity, and Officer Mote’s lawsuit against her may proceed. Officer Mote sought before he was fired to organize police officers with the City of Corith, TX into a “Corith Police Officers Association” [no collective bargaining rights under TX law], affiliated with the Texas Municipal Police Association. The Court wrote, “The First Amendment protects the right of all
persons to associate together in groups to ‘advanc[e] beliefs and ideas.’ Put another way, ‘the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests.’ When groups gather together for this purpose, ‘it cannot be seriously doubted’ that they comprise associations protected by the First Amendment. *** We conclude that Mote’s right to speak in furtherance of forming the CPOA was clearly established as an integral part of his association rights. *** We agree with the district court that Mote’s association and speech rights to engage in the activities he alleged were clearly established. We therefore DISMISS the appeal.”

Legal Lessons Learned: Very strong opinion concerning free speech rights of public employees. Fire & EMS departments should adopt a “Social Media” policy that recognizes free speech rights, but also cautions members to not publicly discuss internal matters.

1-11

OH: DYING DECLARATION IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 13]
On July 25, 2018, in State v. Fred Taylor, 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

“Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.”

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a “dying declaration” is admissible in evidence. Recording the words on your run report can help prosecution reach a plea agreement.

1-10

MI: HOMEOWNER CONV. ARSON – NO “MIRANDA WARNING” REQUIRED, SPOKE TO PD INFORMANT
“The petitioner was not entitled to Miranda warnings when she was questioned by an informant at a restaurant or when questioned by Detective Morey in connection with her unemployment benefits because she was not in “Miranda custody.”

Legal Lessons Learned: If suspect in arson case is not in custody, then Miranda warnings not required.

1-9

U.S. SUPREME COURT – UNION “FAIR SHARE” FEES – REQUIRES EMPLOYEE SPECIFIC CONSENT
On June 27, 2018, in Janus v. American Federation of State, County, And Municipal Employee, Council 32, et al, the U.S. Supreme Court (5 to 4) held in opinion by Justice Alito:

“Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

Legal Lessons Learned: Fire & EMS Departments with unions need to dialog with their union officers about getting written authorization from each employee to deduct “fair share” or other union fees. See also IAFF Statement: https://client.prod.iaff.org/#contentid=68451, and Blog: http://blog.iaff.org/post/2018/06/05/preparing-for-the-janus-v-afscme-council-31-supreme-court-ruling

1-8

U.S. SUPREME COURT: SEARCH WARRANT REQUIRED FOR CELL TOWER DATA, UNLESS EMERGENCY
On June 22, 2018, in Carpenter v. United States, the U.S. Supreme Court (5 to 4), in opinion by Chief Justice Roberts, held that a search warrant is normally required to track a person’s cell phone location, but also recognized an emergency exception.

“Further, even though the Government will generally need a warrant to access CSLI [cell-site location information], case-specific exceptions may support a warrantless search of an individual’s cell-site records under certain circumstances. ‘One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’ Kentucky v. King, 563 U. S. 452, 460 (2011) (quoting Mincey v. Arizona, 437 U. S. 385, 394 (1978)). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U. S., at 460, and
n. 3. As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.”


Legal Lessons Learned: Fire & EMS Departments in emergency situations – for example, when conducting search for a missing person who may be carrying a cell phone – may still coordinate with law enforcement and get cell tower information without a search warrant. [Note: Justice Kennedy announced his retirement on June 27, 2018; he has been the “swing vote” in many 5 to 4 decisions. Future cases involving access to electronic records will undoubtedly get to the U.S. Supreme Court.]

1-7

PA: DOT EMPLOYEE FIRED FOR FACEBOOK POSTS ON BAD SCHOOL BUS DRIVERS – REINSTATED [also filed, Chap. 16]

On June 12, 2018, in Rachel L. Carr v. Commonwealth of Pennsylvania / Department of Transportation and Civil Service Commission, the Commonwealth Court of Pennsylvania held (3 to 0) that the employee’s FACEBOOK posts about local school bus drivers were “inappropriate” but were protected since it “touched on a matter of public concern.” The Court wrote: “After a thorough review of the record and a conscientious analysis of the factors articulated by the United States Supreme Court, we conclude that the Department’s generalized interest in the safety of the traveling public does not outweigh Carr’s specific interest in commenting on the safety of a particular bus driver. While Carr’s comments are undoubtedly inappropriate, such comments still receive protection under the First Amendment.”

http://www.pacourts.us/assets/opinions/Commonwealth/out/380md17_6-12-18.pdf

Legal Lessons Learned: Fire & EMS Departments should have a Social Media Policy that clearly advises personnel that their “Free Speech rights” are limited when discussing FD internal matters.

1-6

NY: NYPD / FDNY TRDEMARKS – CITY SUING “COP SHOP”

On June 7, 2018, in The City Of New York v. Blue Rage Inc, d/b/a THE COP SHOP, and Salvatore Piccolo & Susan Piccolo, a United States Magistrate Judge in Central Islip, New York, held in a pre-trial dispute that the City does not need to disclose the profits it makes on its merchandise, or its contributions to non-profit organizations.

Legal Lessons Learned: Protect your trademarks. “Under trademark law, the amount of statutory damages can range from a low of $1,000 for innocent infringement to a high of $2,000,000 for willful infringement.” 15 U.S.C. § 1117(c). http://buchanan-labs.com/statutory-damages-for-infringement-of-your-copyrights-and-trademarks/

1-5

OH: FIRE LOSS INSURANCE – CLEVELAND MUST RETURN $175,000 DEPOSITED WITH CITY

On May 31, 2018, in WRRS, L.L.C. v. City of Cleveland, the Court of Appeals for 8th Appellate District (County of Cuyahoga), 2018 Ohio 2129, held (3 to 0):

“The Board's 2012 decision, however, does preclude the City from continuing to withhold the $175,000 WRRS deposited with the City pursuant to Ohio’s fire loss statute. In 2012, the Board [of Building Standards] found the WRRS property to be in compliance after the fire. The City could have appealed from the 2012 decision, but chose not to do so. Thus, the City is now precluded under res judicata from challenging the Board's 2012 decision. As a result, the City is ordered to return the $175,000 to WRRS.”https://cases.justia.com/ohio/eighth-district-court-of-appeals/2018-105661.pdf?ts=1528147387

Legal Lessons Learned: Under Ohio Revised Code 3929.86, “Fire loss claims,” for claims in excess of $5000, insurance companies must first deposit payment with political subdivision.”

“(A) No insurance company doing business in this state shall pay a claim of a named insured for fire damage to a structure located within a municipal corporation or township in this state where the amount recoverable for the fire loss to the structure under all policies exceeds five thousand dollars, unless the company is furnished with a certificate pursuant to division (B) of this section, and unless there is compliance with the procedures set forth in divisions (C) and (D) of this section.”

1-4

SC: ARSON INVESTIGATOR “EXPERT” – 1 YEAR OF EXPERIENCE - ARSON DOG ALSO QUALIFIED

On April 11, 2018, in The State v. Paula Reed Rose, the South Carolina Court of Appeals affirmed (3 to 0) the conviction of Ms. Rose of third-degree arson, filing a false police report, burning personal property to defraud an insurer, and making a false insurance claim to obtain benefits for fire loss, for which the trial court sentenced her to a “cumulative term of five years' home incarceration with five years' probation.” https://caselaw.findlaw.com/sc-court-of-appeals/1893632.html
LEGAL LESSONS LEARNED: There is no specific “time on the job” requirement to be qualified as an expert in origin and cause.

1-3

U.S. SUPREME COURT: LANDMARK DECISION ON QUALIFIED IMMUNITY
– ONLY IF CLEAR CONSTIT. VIOL. [also filed, Chap. 2]

On April 2, 2018, in Andrew Kisela v. Amy Hughes, the U.S. Supreme Court reversed the 9th Circuit and held (7 to 2) the police officer who shot Amy Hughes should have been dismissed from the lawsuit:

“Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

https://supreme.justia.com/cases/federal/us/584/17-467/

Legal Lessons Learned: Justices sent a message that qualified immunity protects police officers from personal liability unless conduct clearly unjustified.

See New York Times article on this decision: “The court’s decision was unsigned and issued without full briefing and oral argument, an indication that the majority found the case to be easy.”


1-2

TX: MURDER TRIAL FOR KILLING A POLICE OFFICER – POLICE MAY ATTEND TRIAL IN UNIFORM

On March 27, 2018, in Shelton Denoria Jones v. Lorie Davis, Director, Texas Department of Criminal Justice, the U.S. Court of Appeals for 5th Circuit, held (3 to 0) that the defendant was not deprived of a fair trial in state court:

“the record before us does not suggest the police presence intimidated the jury or disrupted the factfinding process in any way.”

file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/XO250S7T/15-70040-CV0.pdf

LEGAL LESSONS LEARNED: Helpful decision – no evidence of jury intimidation by having emergency responders in uniform, watching a jury trial. Before showing up in uniform, please discuss with your Chief and the prosecutor, who may want to review with trial judge, prior to start of trial.
IL: DEPUTY FIRE CHIEF FIRED - WARNED ABOUT “POLITICAL COMMENTARY” ON FACEBOOK [also filed, Chap. 16]
On Jan. 11, 2018, in Richard Banske v. City of Calumet City, U.S. District Court, Northern District of Illinois (Case No. 17C5263), Judge Harry D. Leinenweber granted City’s motion to dismiss.

“[A] policymaking employee may be discharged ‘when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.’ Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske’s at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted.”

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the “balancing test” of U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 (1968).

Pickering decision: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”
https://supreme.justia.com/cases/federal/us/391/563/
Chap. 2   Line Of Duty Death / Safety

2-28

MI:  DEPUTY CHIEF OBTAINED PROTECTIVE ORDER – CIVILIAN NO LONGER ALLOWED 2 STATIONS - MUST FEEL THREATENED

On Nov. 19, 2020, in RS, Petitioner v. AH, Respondent, the State of Michigan Court of Appeals held (3 to 0) that the trial court should not have issued a Personal Protective Order for stalking against the civilian (1-year; expired July 18, 2020) because the Deputy Chief testified that he did not feel emotional distress, just wanted it the harassment stopped.

“In light of the record, we conclude that petitioner failed to meet his burden of proof for obtaining the PPO. Specifically, in order to demonstrating stalking, MCL 750.411h(1)(d), petitioner had to show harassment that included ‘repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim emotional distress.’ MCL 750.411h(1)(c). The stalking must actually cause the individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(1)(d). However, when petitioner was questioned on cross-examination regarding how the Facebook written and video posts impacted him, he testified, ‘I didn't give it much thought at all, I just know that this is very odd, and this is very concerning to me that he's posting anything about me, and driving down my street.” More importantly, when petitioner was expressly asked whether respondent harassed and threatened him, he replied, "No, I claimed exactly what I stated her[e].”

https://www.leagle.com/decision/inmico20201120334

Legal Lesson Learned: The Deputy Chief could have also asked County Prosecutor to bring criminal charges against the stalker under the Michigan “cyber stalking” statute.

Michigan 750.411h: Stalking; definitions; violation as misdemeanor; penalties; probation; conditions; evidence of continued conduct as rebuttable presumption; additional penalties.

(2) An individual who engages in stalking is guilty of a crime as follows:
(a) Except as provided in subdivision (b), a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
(b) If the victim was less than 18 years of age at any time during the individual's course of conduct and the individual is 5 or more years older than the victim, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both.
(3) The court may place an individual convicted of violating this section on probation for a term of not more than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:
(a) Refrain from stalking any individual during the term of probation.
(b) Refrain from having any contact with the victim of the offense.
(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

http://www.legislature.mi.gov/(S(dodu2xg2ouu1vonwqhfxqy4i2))/mileg.aspx?page=getObject&objectName=mcl-750-411h

2-37

PA: DISPATCHER TOLD MOTHER STAY 3\textsuperscript{rd} FLOOR APARTMENT – 3 DEAD FIRE – NO “STATE CREATED DANGER,” LAWSUIT DISMISSED

On Sept. 22, 2020, in Tamika Johnson, Administratrix of Estates of Alita Johnson, Horace McCouellem and Haashim Johnson v. City of Philadelphia, the U.S. Court of Appeals for the Third District (Philadelphia) held (3 to 0) that the trial court properly granted the City’s motion to dismiss. Recognizing the tragic consequences of the error by the Dispatcher, there was no prior history of similar mistaken advice by dispatchers for 911 callers to remain in the apartment; no violation of the “State Created Danger” theory of municipal liability – no violation of “shock the conscience” test.

“The District Court held that, as alleged, neither the Dispatcher nor the Operator was liable for the Johnson Family's harm. Because the Dispatcher did not act affirmatively, and because the Operator's behavior did not shock the conscience, we agree.

***

Appellant alleges that the Operator violated the Johnson Family's constitutional rights by ‘directing them to close themselves inside the burning building's 3rd floor rear room, assuring them that [f]irefighters were coming to their rescue, but then failing inexplicably to inform the [f]irefighters of [their] existence, location, or need of rescue.’ …. The District Court held that those allegations do not ‘shock the conscience,’ as that phrase is defined in our precedent. We agree.

***

Finally, Appellant alleges that the City simply ignored the history of problems at the Johnson Family's residence, by failing to fix the building’s fire hazards and failing to stop the building owners’ practices. The District Court held that the City was immune from these negligence claims because it had insufficient control over the building. Under the relevant Commonwealth law, we agree.”


Legal Lessons Learned: Tragic set of facts; hopefully Dispatchers throughout the Nation have learned from this event.
KY: ARSON – INSURANCE FRAUD – CONVICTED ARSON WITH DEATH – FF LODD AT SCENE, FF HAD MEDICAL HISTORY - CONV. UPHeld

On July 7, 2020, in United States of America v. Steve Allen Pritchard, the U.S. Court of Appeals for Sixth Circuit (Cincinnati) affirmed (3 to 0) the conviction, and his enhanced sentence of 360 months in prison. Court wrote: “Even though Pritchard offered evidence that Sparks’s pre-existing medical condition led to his death, the jury found an unbroken chain of causation between the fire and Sparks’s heart attack. Just as we did not disturb a jury’s finding that the patient’s “actions as an addict cannot be said to break the chain of proximate causation[,]” we do not disturb the jury’s conclusion that Sparks’s medical ailments did not sever the causal link between the fire and his death.”


NY: FIREMAN’S RULE – PD INJURED, FRONT EDGE STEP BROKE – OWNER DEFAULT, CAN’T SUE MORTGAGE CO.

On June 10, 2020, in Joseph B. Maher v. Wells Fargo Financial New York, Inc., et al., 2020 NY Slip Op 03219, the Supreme Court of New York, Appellate Division (Second Judicial Department) held (5 to 0) that the trial court had properly granted summary judgment to the defendant mortgage company and its subs that maintained the property, since they owed no duty of care to the police officer. The Court held: “On May 26, 2011, the plaintiff, a police officer, was in the process of executing a parole arrest warrant, which required him to enter certain property in Hempstead (hereinafter the property). The plaintiff allegedly was injured when, while walking down a flight of stairs, the front edge of one step broke and he fell down the remaining stairs. At the time of the incident, the defendant Charles White owned the property, but had defaulted on his mortgage loan payments in April 2011. *** The ‘firefighter’s rule,’ which ‘bars recovery in negligence for injuries sustained by a firefighter [or a police officer] in the line of duty’ (Giuffrida v Citibank Corp., 100 NY2d 72, 76), was abolished by General Obligations Law § 11-106, except as to actions against municipal employers and fellow police officers…. *** Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the negligence cause of action insofar as asserted against each of them by demonstrating that they did not own or control the subject premises, or assume any duty to the plaintiff, which might serve as a predicate for liability (see Pollard v Credit Suisse First Boston Mtge. Capital, LLC, 66 AD3d at 863).”


Legal Lessons Learned: The Fireman’s Rule has been abolished in New York; also abolished in Florida.

Note: New York General Obligations Law § 11-106 provides in part:

“In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a
representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death.”

Florida (2019)
112.182 “Firefighter rule” abolished.—
(1) A firefighter or properly identified law enforcement officer who lawfully enters upon the premises of another in the discharge of his or her duty occupies the status of an invitee. The common-law rule that such a firefighter or law enforcement officer occupies the status of a licensee is hereby abolished.
(2) It is not the intent of this section to increase or diminish the duty of care owed by property owners to invitees. Property owners shall be liable to invitees pursuant to this section only when the property owner negligently fails to maintain the premises in a reasonably safe condition or negligently fails to correct a dangerous condition of which the property owner either knew or should have known by the use of reasonable care or negligently fails to warn the invitee of a dangerous condition about which the property owner had, or should have had, knowledge greater than that of the invitee.
History.—s. 1, ch. 90-308; s. 693, ch. 95-147.
http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0112/Sections/0112.182.html

2-34

MD: WIFE OF DECEASED FF ENTITLED TO DEATH BENEFITS – 2-YRS PRIOR HE SETTLED WORKERS COMP FOR HEART DISEASE / HYPERTENSION – WIFE DID NOT WAIVE RIGHTS

On May 26, 2020, In The Matter Of Bernard L. Collins, the Court of Appeals of Maryland held (7 to 0) that Mrs. Collins was not a party to the settlement between Mr. Collins and the workers comp insurance companies for the fire department, and the settlement did not extinguish her future claim for death benefits.

Legal Lessons Learned: If the insurance companies wish to negotiate a “global settlement” with an employee, that also includes waiver of future death benefits for employee’s spouse, then invite the spouse to participate in settlement discussions and sign the settlement agreement.

2-33

UT: STATE SUPREME COURT ALLOWS FF TO SUE TREE COMPANY FOR INJURIES – “PROFESSIONAL RESCUER RULE” MODIFIED FOR GROSS NEGLIGENCE BY BUSINESS
On May 20, 2020, in David Scott Ipsen v. Diamond Tree Experts, Inc., the Utah Supreme Court held (3 to 2) that the injured firefighter may pursue his lawsuit for damages from injuries at a mulch fire. [https://www.utcourts.gov/opinions/supopin/Ipsen%20v.%20Diamond%20Tree%20Experts20200520_20181052_30.pdf](https://www.utcourts.gov/opinions/supopin/Ipsen%20v.%20Diamond%20Tree%20Experts20200520_20181052_30.pdf)

Legal Lessons Learned: A significant decision on behalf of all Utah emergency responders.

2-32

**CA: LODD – AIR TANKER MISTAKENLY DROPPED RETARDENT 100 FEET ABOVE FF – DOUGLAS FIR TREE KILLED FF – WIFE CANNOT SUE STATE OR TANKER CO – GOV’T IMMUNITY**


Legal Lessons Learned: What a tragic loss of life. Government and qualified immunity are important legal protections for both government employees, and private companies rendering emergency services under contract with government.


2-31

**OK: FF LODD – FF SUCKED INTO DRAIN PIPE / NO SAFETY GATE – WORKERS COMP IS WIDOW’S SOLE REMEDY – AMAZING THAT SECOND FF ALSO SUCKED INO PIPE BUT SURVIVED**

On May 5, 2020, in Shelli Farley v. City of Claremore, 2020 OK 30, the Oklahoma Supreme Court held (8 to 1) that the surviving spouse’s lawsuit for negligence and intentional tort was properly dismissed by the trial court. “The wrongful death injury was adjudicated and compensated by a successful workers’ compensation claim after the death of the decedent. This successful adjudication demonstrates the decedent's injury was exclusively before the Commission and not cognizable as a District Court claim at the time of decedent's death.” [https://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=486529](https://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=486529)

Legal Lessons Learned: Tragic loss of life, but workers comp is sole remedy.
CLAREMORE, Okla. — The drowning of an Oklahoma firefighter and a Texas teenager in storms that swept through those states highlight the persistent dangers posed by storm drains that help protect neighborhoods during flash flooding but can suck in unsuspecting residents and rescue workers.

https://www.firerescue1.com/firefighter-training/articles/firefighters-death-highlights-municipal-storm-drain-dangers-VaH0e7nB3CMWpKRS/

2-30

MI: FF LODD – VACANT HOUSE FILE – MURDER CONV UPHELD - DEF. PAID EMPLOYEE BURN HOUSE, INSURANCE

On April 16, 2020, in People of State of Michigan v. Mario Willis, the State of Michigan Court of Appeals, in an unpublished opinion, held (3 to 0) that after jury convicted defendant of second-degree murder in death of Detroit Firefighter Walter Harris and arson. The defendant paid an employee to set fire to a home owned by defendant’s girlfriend. The house had been damaged in a previous fire, and defendant’s girlfriend had received insurance proceeds to repair the damage. Court of Appeals remanded case for resentencing, so trial judge can explain why he imposed an enhanced minimum sentence. The original sentence was “500 to 750 months for the second-degree murder conviction and 10 to 20 years for the arson of a dwelling-house conviction.”

“[J]ust as we are not persuaded that defendant must have wielded an instrumentality personally, we are also not persuaded that its intentionally harmful use must only be directly and immediately against a person. The jury convicted defendant of second-degree murder based on his involvement in burning the house. The jury therefore implicitly found that defendant did use the gasoline as an offensive instrumentality against a person, even if that use against a person was indirect and achieved by way of destroying property. Furthermore, as noted, the victim, a firefighter, was not an unforeseeable hapless bystander and did not choose to encounter the danger; rather, the victim entered the burning structure specifically because his duties required him to do so. Thus, under the circumstances, we find harmless the trial court’s failure to make an express factual finding as to defendant’s intent in using the gasoline. We therefore reject defendant’s argument that the gasoline was not a ‘weapon’ for purposes of OV 1.

http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200416_C346057_26_346057OPNORDER.PDF

Legal Lessons Learned: When the defendant hired his employee to burn of structure, both the employer and the employee can be convicted of murder and arson.

Note: Read NIOSH Fire Fighter Fatality Investigation Report, F2008-37 Date Released: January 31, 2010: “On November 15, 2008, a 38-year-old male fire fighter (the victim) died after being crushed by a roof collapse in a vacant/abandoned building.”

https://www.cdc.gov/niosh/fire/reports/face200837.html
OH: FF INJURED KNEE STEPPING DOWN FROM ENGINE — STEP WAS MORE 24 INCHES OFF GROUND - VSSR PENALTY

On Feb. 11, 2020, in The State ex rel. Madison Fire District v. Industrial Commission of Ohio, 2020 Ohio 463, the Ohio Court of Appeals for Tenth Appellate District, held (3 to 0) that firefighter Joseph P. Purcell, who injured his right knee stepping out of the cab of a 1995 Spartan Darley, was properly awarded his VSSR [violation of specific safety regulation] claim; 15% to 50% of workers comp. award.

“In 2009, the department commissioned a master plan evaluation by an independent third party to do a study of every aspect of the fire department. As a part of that study, the fire engines in use by the department at that time were evaluated. Engine 2124 was a part of that evaluation. The evaluation report states that the department should consider installing steps into cab for safety to engine 2124 [1995 Spartan Darley].”


Legal Lessons Learned: Ohio FDs should review the Ohio Administrative Code regulation on fire apparatus, including the height of steps. http://codes.ohio.gov/oac/4123:1-21-04v1. VSSR penalties can range from 15 to 50% of the maximum allowable weekly compensation rate granted the injured worker.


2-28

DE: ROLLING BLACKOUTS – THREE FF KILLED, THREE INJURED – NOT VIOLATION OF FED CONSTIT. RIGHTS

On Jan. 9, 2020, in Firefighter Brad Speakman, et al. v. Dennis P. Williams, City of Wilmington, et al, U.S. District Court Judge Maryellen Noreika dismissed the lawsuit by the families of the firefighters killed on Sept. 24, 2016. The Court held that the “rolling bypass” practices may be a basis for a tort lawsuit in state court, the practice is not a violation of the substantive rights guaranteed by the Fourteenth Amendment to the U.S. Constitution.

“This case, like Estate of Phillips, Estate of Phillips, [Washington, D.C. line of duty deaths in] Estate of Phillips v. D.C., 455 F.3d 397 (D.C. Cir. 2006)], involves a tragedy. Lieutenant Christopher Leach, Senior Firefighter Jerry Fickes, and Senior Firefighter Ardythe Hope died, and Firefighter Brad Speakman, Senior Firefighter Terrance Tate, and Lieutenant John Cawthray suffered severe injuries. But as the Estate of Phillips court recognized, the Constitution does not provide a basis to address all injuries…. The Court has no doubt that, as Plaintiffs argue … a relationship exists between shift staffing and firefighter safety. For the reasons articulated, however, that relationship alone does not transform Present Defendants’ conduct into substantive due process violations [of the 14th Amendment of U.S. Constitution]…. In other words, like the firefighters in Estate of Phillips, Plaintiffs allege that Present Defendants (along with others) exposed Firefighter Plaintiffs to ‘additional risks of injury unknown to [them] when they joined’ the WFD. 455 F.3d at 407. Yet, as explained, such increased risk is not enough to establish a substantive due process violation where the underlying risk is inherent in the injured parties’ profession and is not so extremely elevated that employees will almost certainly and immediately be injured if they carry out their work.”


2-27

NY: FF SOLICITING FUNDS - HOMEOWNER AT DOOR WTH FIREARM – ARRESTED – MALICIOUS PROS. CASE DISMISSED


“There are no factual allegations to plausibly suggest that Defendants lacked reasonable cause to believe that Semencic had menaced Maloney with a weapon in violation of New York law. Plaintiff was charged by information with menacing in the second degree, which provides that ‘[a] person is guilty of menacing in the second degree when . . . He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm. . . .’ N.Y. PENAL LAW § 120.14. Semencic’s own version of the events, in which he concedes his display of the gun, coupled with [firefighter] Maloney’s assertion in his statement that he was ‘in fear of his life,’ essentially establishes a menacing charge. *** [P]ointing a gun at and tapping that gun against a 'Do Not Knock No Peddlers' sign and saying 'Go Away' can, given what guns are designed to do, be perceived as an attempt to instill the requisite fear that injury will ensue if the sign and the command are not obeyed. [Emphasis by Judge Feuerstein.]”

https://public.fastcase.com/W1%2B2t%2BeVuI35%2FN70vAMFZnOFSxLvAGpuUD2VM9emafhy4fr43G9Vd6d9h%2FUBoSxo

Legal Lessons Learned: Suggestion – conduct “door to door” solicitations in pairs, in uniform, and be extremely caution where the homeowner has posted Do Not Knock or similar signs. See article on the arrest, “West Hempstead man menaced fire volunteer with gun, police say” (July 20, 2016):


2-26

LA: OFFICER INJURED - “BLACK LIVES” PROTEST – SUING PROTEST LEADER – TOUGH CASE TO WIN / FIREMAN’S RULE
On Jan. 28, 2020, in Officer John Doe v. Deray McKesson; Black Lives Matter, the U.S. Court of Appeals for 5th Circuit (New Orleans), declined to hear the appeal en banc (by all 16 Circuit Court judges (on a tie vote of 8 to 8). Dec. 16, 2019 decision by 3-judge panel held (2 to 1) that the police officer’s lawsuit against the protest organizer, Deray McKesson, would be reinstated and remanded to trial judge. In the Dec. 16, 2020 decision, Circuit Judge E. Grady Loll wrote:

“We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration. The complaint alleges that Mckesson planned to block a public highway as part of the protest. And the complaint specifically alleges that Mckesson was in charge of the protests and was seen and heard giving orders throughout the day and night of the protests. Blocking a public highway is a criminal act under Louisiana law. See La. Rev. Stat. Ann. § 14:97. Indeed, the complaint alleges that Mckesson himself was arrested during the demonstration. It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway.”


Legal Lessons Learned: On remand, the police officer has an “uphill battle” to overcome the Professional Rescuer Doctrine [also known as the Fireman’s Rule]. See dissent by Circuit Judge James C. Ho, in the Jan. 28, 2020 decision of 5th Circuit (on tie vote of 8 to 8) to not rehear the case en banc.

“We police officers and firefighters dedicate their lives to protecting others, often putting themselves in harm’s way. These are difficult and dangerous jobs, and citizens owe a debt of gratitude to those who are willing and able to perform them. What’s more, police officers and firefighters assume the risk that they may be injured in the line of duty. So they are not allowed to recover damages from those responsible for their injuries, under a common law rule known as the professional rescuer doctrine.

***

Civil disobedience enjoys a rich tradition in our nation’s history. but there is a difference between civil disobedience—and civil disobedience without consequence… Citizens may protest. But by protesting, the citizen does not suddenly gain immunity to violate traffic rules or other laws that the rest of us are required to follow. The First Amendment protects protest, not trespass. That said, this lawsuit should not proceed for an entirely different reason—the professional rescuer doctrine. I trust the district court will faithfully apply that doctrine if and when Mckesson invokes it, and dismiss the suit on remand, just as it did before.”


See also the ACLU’s petition requesting U.S. Supreme Court to hear the case:

2-25
TX: FF / BAPTIST MINISTER – OBJECTED TO TETANUS VACCINATION – DECLINED INSPECTOR JOB - FIRED

On Jan. 9, 2020, in Brett Horvath v. City of Leander, Texas, the U.S. Court of Appeals for the 5th Circuit (New Orleans), held (3 to 0) that U.S. District Court properly granted the city’s motion for summary judgment. The firefighter was offered transfer from 24/48 hour driver / pump operator, to 40-hour code enforcement position; he rejected this since he ran construction company while off duty.

“In 2016, the Fire Department began requiring TDAP [Tetanus, Diphtheria, Pertussis Vaccine] vaccinations, to which Horvath objected on religious grounds. He was given a choice between two accommodations: transfer to a code enforcement job that did not require a vaccination, or wear a respirator mask during his shifts, keep a log of his temperature, and submit to additional medical testing. He did not accept either accommodation and was fired by Fire Chief Bill Gardner for insubordination.

***
The City argues that its legitimate, non-discriminatory reason for Horvath’s termination was his defiance of a direct order by failing to select an accommodation to the TDAP vaccine policy. The district court found that ‘Horvath was terminated not for engaging in protected activity by opposing a discriminatory practice in a letter, but for failing to comply with a directive that conflicted with his religious beliefs.’ We agree.”

http://www.ca5.uscourts.gov/opinions/pub/18/18-51011-CV0.pdf

Legal Lessons Learned: The FD offered a reasonable accommodation.

2-24

NY: FF WORKED WTC – HEART ATTACK / DROWNING – 7-YR APPEAL - MEDICAL BOARD “BAD FAITH”, NO SANCTIONS

On Dec. 4, 2019, in Fernandez v. Nigro, the Supreme Court of New York / Appellate Division (Second Judicial Department), 2019 NY Slip Opinion 8672, held (3 to 0) that trial judge did not have authority to impose additional sanctions against the Fire Department for “bad faith” in denying benefits for seven years.

“The conduct at issue did not constitute conduct in the proceeding before the court and, therefore, sanctions were not authorized by 22 NYCRR 130-1.1. Further, an award of costs or the imposition of sanctions may be made only after a reasonable opportunity to be heard (see 22 NYCRR 130-1.1[d]). The Supreme Court's sua sponte determination to impose sanctions here was made without notice to the parties….Accordingly, the Supreme Court was without authority to impose sanctions, and the order must be reversed insofar as appealed from.” https://law.justia.com/cases/new-york/appellate-division-second-department/2019/2016-10855.html

Legal Lessons Learned: It is unfortunate the NY statute does not allow sanctions, when the trial judge finds that the family of the deceased firefighter was “plainly entitled under the relevant law” to accidental death benefits. The pension is increased from one-half his salary (taxable) to three-quarters of his salary (tax-free), retroactive to August 23, 2007.
NV: HEART ATTACK - FF ENTITLED WORKERS COMP – WAS DIETING, WORKING OUT TO LOWER WEIGHT, COLLESTEROL

On Nov. 13, 2019, in *City of Las Vegas v. Burns*, the Court of Appeals of Nevada, held (3 to 0) that despite the firefighter’s predisposition for a heart attack, he was entitled to workers comp coverage, upholding trial court which had overturned administrative appeals officer.

“Moreover, there is not substantial evidence in the record to indicate that Burns was capable of reducing his cholesterol, triglycerides, or weight by dieting and exercising. To the contrary, the record indicates that, following his required annual physicals in 2010, 2011, and 2012, the physicians’ assessments and recommendations indicate Burns ‘continue[s] to do an excellent job maintaining [his] health;’ that he should ‘[k]eep up [his] exercise regimen ... it’s doing great for [him];’ and that he was ‘doing well maintaining [his] health.’ In 2012, the physician noted that although his ‘bad’ cholesterol and triglycerides were high, Burns was taking fish oil supplements as previously directed by his private physician and his total cholesterol was fine. Thus, the physicians’ reports indicate that Burns was doing what he was instructed to do, he was exercising and taking supplements, and despite that, his predisposing factors did not change, which reflects that he was not capable of correcting his predisposing conditions.

Because there is no evidence in the record to support the conclusion that correcting Burns' predisposing conditions was within his ability, we necessarily hold that the appeals officer's conclusion is not supported by substantial evidence. [source](https://www.leagle.com/decision/innvco20191115257)

Legal Lessons Learned: The statutory requirement that firefighters must seek to correct their “predisposing condition” to cardiac problems makes lots of sense.

WA: UNION PROPOSAL INCREASE IN MINIMUM STAFFING – MANDATORY SUBJECT FOR COLLECTIVE BARGAINING

On Oct. 28, 2019, in *City of Everett v. State of Washington Public Employment Relations Commission*, the State of Washington Court of Appeals, held (3 to 0) that shift staffing has a direct relationship to workload and safety, and therefore is a mandatory subject of collective bargaining (union wants to increase from 28 to 35 per shift).

“We conclude PERC did not err in balancing the strong fundamental prerogative of the City on shift staffing and the unrebutted workload and safety testimony, and substantial evidence supports PERC finding the Union demonstrated a direct relationship between the Union proposal to increase the minimum number of
Legal Lessons Learned: Fire & EMS officials need to consult with legal counsel in their State concerning whether minimum staffing is a subject mandatory bargaining.

KY: FF’s STRENUOUS RETURN-TO-WORK PHYSICAL FITNESS TEST – HEART ATTACK SAME DAY – PRIOR HEALTH PROB - NOT LODD

On Sept. 20, 2019, in Sharon Jenkins v. Kentucky Retirement Systems, the Kentucky Court of Appeals held (3 to 0; unpublished opinion) that the Retirement Board properly denied wife of deceased firefighter “line-of-duty” death benefits, but she is entitled to “basic” death benefits. LODD benefits would have include lump sum of $10,000 and a monthly payment equal to 10% of Malcolm’s monthly final rate of pay; “Basic” benefits were an actuarial fund, or a lump sum. Judge Kelly Thompson wrote:

“Sharon [Jenkins] points out that under federal law providing death benefits to federal safety officers, it is presumed that a fatal heart attack occurring within 24 hours of a nonroutine stressful or strenuous physical activity in the line of duty is presumed to be the direct and proximate result of that activity. 34 United States Code §10281. While such a presumption might resolve some of the inherent difficulty in determining the cause of a cardiac event, that same presumption is not found in KRS16.601. ‘As administrative agencies are creatures of statute,’ this Court cannot require that such a presumption be applied to claims for in-line-of-duty death benefits. Kentucky Retirement Systems v. Bowens, 281 S.W.3d 776,784 (Ky. 2009).”

Legal Lessons Learned: In cases involving a “battle of the experts,” Courts will normally not overturn findings of the Administrative Agency. The federal death benefits statute for firefighters and other public safety officers, who die within 24 hours of "nonroutine stressful or strenuous physical" activity was written to avoid these kinds of disputes. See May 15, 2018 announcement: “Justice Department Announces Improvements to Public Safety Officers’ Benefits Program.”

Legal Lessons Learned: Fire & EMS officials need to consult with legal counsel in their State concerning whether minimum staffing is a subject mandatory bargaining.
NY: LIVER CANCER - FF WORKED AT 9/11 WORLD TRADE CENTER – ACCIDENTAL DISABILITY BENEFITS AWARDED

On Sept. 3, 2019, in Matter Of Joseph Daly v. Daniel Nigro, Supreme Court, Kings County (Judge Katherine A. Levine), in unpublished opinion, held that there is a statutory presumption that the firefighter’s liver cancer was caused by his work at the World Trade Center cleanup operation. The firefighter’s pension is therefore increased from one-half his salary (taxable) to three-quarters of his salary (tax-free).

“While the Pension Fund does not dispute that Daly has a qualifying physical condition, it argues that it presented competent evidence to the court which disproves that petitioner's disability was attributable to his WTC rescue, recovery and cleanup operations, and proves that it was caused by persistent ascites and abdominal distention due to alcoholic cirrhosis of the liver. This court finds that respondent failed to proffer competent evidence to rebut the presumption that petitioner's qualifying physical condition was caused by the hazards he encountered at the WTC site.”


Legal Lessons Learned: The World Trade Center legislation created a “statutory presumption” that cancer was caused by their work at the WTC. All firefighters should keep a record of structure fires and other exposures to hazardous environments, including even if you work in a state that have enacted workers comp. statutory presumptions, such as Ohio. See the Ohio application:


“Have you been assigned to at least six years of hazardous duty as a fire fighter? Yes No If yes, please provide a history of your hazardous duty as a firefighter. “Hazardous duty” means duty performed under circumstances in which an accident could result in serious injury or death.”

PA: THREE FF KILLED – ROW HOUSE STRUCTURE FIRE - MAYOR, FIRE CHIEF DENIED QUALIFIED IMMUNITY – “ROLLING BROWNOUTS”

On Aug. 28, 2019, in Firefighter Brad Speakman, Ret., et. al v. Dennis P. Williams, James M. Baker, Anthony S. Goode, William Patrick, and City of Wilmington, U.S. Magistrate Judge Mary Pat Thynge, U.S. District Court for the District of Delaware, issued a Report And Recommendation to a U.S. District Court judge assigned to this lawsuit arising from September 24, 2016 structure fire in a row house started by an arsonist. The Magistrate recommended that Mayor Williams, Fire Chief Goode not be granted qualified immunity at this time because of their “brownouts” of fire stations – called “rolling bypass policy.”


Magistrate Judge Thynge wrote:

“Mayor Williams and Chief Goode understood that, with fire houses closed, overtime, the main impetus for the rolling bypass policy, substantially increased during both the Goode and Williams’ administrations. Union Officials routinely warned Mayor Williams and Chief Goode of the dangers
associated with the continued use of rolling bypass. Despite repeated, emphatic warnings and concerns expressed by Union officials, firefighters, City Council, the public, and the media, Mayor Williams and Chief Goode maintained the rolling bypass policy. Accordingly, Plaintiffs adequately state facts which support conduct that shocks the conscious against Mayor Williams and Chief Goode.

***

In the instant matter, City Council enacted a statute to address its concerns of under-staffing and overtime. Plaintiffs contend that Mayor Williams and Chief Goode failed to comply with that statute, and were clearly aware of the dangers concerning rolling bypass. They further maintain that the City, through its Mayors and City Council, understood these dangers. Despite this awareness, neither Mayor heeded these concerns. Such inaction supports Plaintiffs’ allegations. Accordingly, the court finds that Plaintiffs allege sufficient facts against the City for maintaining policies, practices or customs.”

**Legal Lessons Learned:** A tragic loss of life; “rolling brownouts” of fire stations or apparatus continue to be a very controversial issue.

See NIOSH Fire Fighter Fatality Investigation report F2016-18 (November 9, 2018):

[https://www.cdc.gov/niosh/fire/pdfs/face201618.pdf](https://www.cdc.gov/niosh/fire/pdfs/face201618.pdf)

“Ladder 2 was 1st due at this residential structure fire. Note: The 1st due engine (Engine 6) was out of service due to budget constraints affecting overtime and daily staffing of companies. The fire department has to detail fire fighters throughout the city to maintain minimum staffing on a prescribed number of engine companies and ladder companies (e.g., ‘rolling brown outs’). Engine 6 was housed with Ladder 2. The impact of Engine 6 being out of service is unknown.” [Page 25.]


**KY: VOL. FF INJURED LEG & KNEE ON ICE – WORKERS COMP. FOR MEDICAL, BUT NO WAGE LOSS – FF IS SELF-EMPLOYED**

On July 12, 2019, in Ken Lashley v. Kentucky Volunteer Fire Department, et al., the Kentucky Court of Appeals held (3 to 0; unpublished opinion) that the Administrative Law Judge correctly determined that the firefighter is not entitled to any wage loss reimbursement since he owns his own business and is self-employed without wages.

“As a volunteer firefighter, his average weekly wage is based on his other ‘regular employment.’ KRS 342.140(3). In this case, Appellant is self-employed…. The ALJ held that because Appellant owned his own business, he did not have wages from regular employment. In other words, Appellant could not claim money earned as the owner of the business as wages for the purpose of calculating his average weekly wage.”

Legal Lesson Learned: Kentucky statute, like many states, will award volunteer firefighters their loss wages based on wages of their “regular employment.” This self-employed firefighter will have his medical expenses covered.

The Administrative Law Judge awarded “temporary total disability (‘TTD’) based upon the state minimum benefit in effect for the date of injury, medical benefits, and placed the claim in abeyance until Lashley reaches maximum medical improvement (“MMI”). The ALJ noted Lashley has not yet reached MMI.”

https://comped.net/opinions_recentdisp.php?ID=7270

MI: RESTAURANT OPERATORS CLAIM THAT “ORIGIN & CAUSE” RPT. CHANGED TO “INCENDARY” TO DEFLECT ATTENTION FD DEFICIENCIES - LODD / $3,500 OSHA FINE

On July 10, 2019, in George Marvaso et al. v. John Adams et al., U.S. District Court Judge Linda V. Parker denied the defense motion to dismiss by the Fire Marshal, the Fire Chief, and his father, the former Fire Chief, holding the “Court concludes that Plaintiffs plead sufficient facts to support their §1983 claim against Defendants and that Defendants are not entitled to qualified immunity.”


Legal Lessons Learned: This lawsuit may now proceed to pre-trial discovery.


https://www.cdc.gov/niosh/fire/pdfs/face201314.pdf

“On May 8, 2013, a 29-year-old male career probationary fire fighter died after running out of air and being trapped by a roof collapse in a commercial strip mall fire. The fire fighter was one of three fire fighters who had stretched a 1½-inch hoseline from Side A into a commercial strip mall fire. The hose team had stretched deep into the structure under high heat and heavy smoke conditions and was unsuccessful in locating the seat of the fire. The hose team decided to exit the structure. During the exit, the fire fighter became separated from the other two crew members. The incident commander saw the two members of the hose team exit on Side A and called over the radio for the fire fighter. The fire fighter acknowledged the incident commander and gave his location in the rear of the structure. The fire fighter later gave a radio transmission that he was out of air. A rapid intervention team was activated but was unable to locate him before a flashover occurred and the roof collapsed. He was later recovered and pronounced dead on the scene.”
MO: CANCER – WIFE OF DECEASED CAPTAIN - WINS WORKERS COMP CLAIM – OCCUPATIONAL EXPOSURES TO CARCINOGENS

On June 4, 2019, in David Cheney (Deceased), Donna Ceney (Spouse) v. City of Gladstone, the Missouri Court of Appeals, Western District, held (3 to 0) that the cancer was work related and she is entitled to workers comp death and burial benefits. 


Judge Edward R. Arnidi, Jr. wrote:

“Both Drs. Lockey and Koprivica reviewed David Cheney’s medical records. Dr. Koprivica also conducted a physical examination of David Cheney before his death. Based on the information gleaned from the records and the physical examination, both doctors concluded that David Cheney’s occupational exposure to carcinogenic smoke, fumes, and particulates experienced during his employment as a firefighter for the City was the prevailing factor in the development of his NHL. The Commission found this evidence credible and persuasive, and we defer to this finding. *** The Commission determined that David Cheney suffered a compensable injury by occupational disease arising out of and in the course of his employment as a firefighter with the City. We affirm.”

Legal Lessons Learned: Litigation such as this case reflects the need for statutory presumption for firefighter cancer. See 33 states with presumption statutes:

See also July 7, 2019 article about this important win: “‘Cancer is killing our firefighters’: Missouri widow’s court win may aid those at risk”: https://www.kansascity.com/news/politics-government/article231974862.html

2-15

IL: FF PRIOR HEART ISSUES - PATIENT DROPPED ON STRETCHER – LINE-OF-DUTY PENSION, LIFETIME HEALTH INSURANCE

On May 28, 2019, in Patrick Cronin v. Village of Skokie, the Appellate Court of Illinois, First District, held (3 to 0) that the retired firefighter was properly awarded lifetime health insurance.

“In summary, because Mr. Cronin was awarded a line-of-duty disability pension by the Pension Board, he met the requirements of section 10(a) of the Benefits Act—that he suffered a catastrophic injury in the line of duty—as a matter of law. Mr. Cronin also met the requirements of section 10(b): the only work-related incident that was presented as a cause of his injury was his act of holding the stretcher as a cardiac patient was dropped onto it and he presented uncontradicted evidence that he reasonably believed he was responding to an emergency. Accordingly, Mr. Cronin is entitled to benefits under the Act, and the circuit court properly granted summary judgment in favor of Mr. Cronin and against the Village.”

http://www.illinoiscourts.gov/Opinions/AppellateCourt/2019/1stDistrict/1181163.pdf

Legal Lessons Learned: The Illinois statute applies even to firefighters with a prior heart issue.
CA: FFs STRUCK HELPING MOTORIST CROSS HIGHWAY – HE FIRST DELAYED CROSSING - LAWSUIT NOT BARRED BY CA “FIREMAN’S RULE”

On April 30, 2019, in Moraga-Orinda Fire District v. Brian Favro, the Court of Appeal of California, First Appellate District, held (3 to 0) in unpublished decision, that trial court improperly dismissed the fire department’s lawsuit seeking to recover cost of workers compensation for injured firefighters.

“There is thus a triable issue of material fact as to whether Favro was negligent in failing to cooperate with the firefighters before they were struck by Briseno-Castaneda’s SUV. If that issue were to be resolved in plaintiffs’ favor, section 1714.9, subdivision (a)(1), would apply, and the firefighter’s rule would not. Because there is a triable issue of material fact, the trial court erred in granting summary judgment.”

https://www.courts.ca.gov/opinions/nonpub/A150651.PD

Legal Lessons Learned: The California statute is a helpful exception to Fireman’s Rule – negligent conduct after individual “knows of the presence of the firefighter.

NJ: FF ACCIDENTAL DEATH BENEFITS - ONLY FOR THOSE WHO DIED WHILE IN “ACTIVE SERVICE”

On March 26, 2019, in Scott Rogow (Deceased) v. Board of Trustees, Police And Firemen’s Retirement System, the Superior Court of New Jersey / Appellate Division held (3 to 0) in an unpublished option:

“Accordingly, we conclude the Board properly determined that Rogow was ineligible for accidental death benefits because he was not a member in active service at the time of his death, as required by N.J.S.A. 43:16A-10, but was retired and receiving an accidental disability retirement allowance. The legislative history supports the Board's decision.”


Legal Lesson Learned: Courts will enforce the plain language of statutes, particularly when the language is supported by the legislative history of the statute
IL: FF WITH PROSTATE CANCER - DENIED COVERAGE
On Nov. 14, 2018, in Clifford A. Ekkert v. Illinois Workers Compensation Commission and Village of Oak Brook, the Appellate Court of Illinois, Second District, Workers Compensation Division, held (5 to 0) that firefighter Ekkert is not covered by workers comp: “claimant did not adequately set forth and develop an argument as to why the ultimate decision of the Commission was contrary to the manifest weight of the evidence.”

Legal Lessons Learned: A firefighter with prostate cancer, seeking workers compensation, needs to consult a board-certified expert in urology. The statutory presumption is rebuttable by employer’s expert witness.

PA: SKIN CANCER - FF DID NOT SHOW SCIENTIFIC EVIDENCE CONNECTING TO JOB
On Oct. 18, 2018, in City Of Philadelphia Fire Department v. Workers’ Compensation Appeal Board (Appeal of Scott Sladek), the Supreme Court of Pennsylvania (sitting in Eastern District, Philadelphia) held (4 to 3) that a firefighter with skin cancer must present scientific evidence to Workers Comp Board that his malignant melanoma is a type of cancer caused by the Group 1 carcinogens. The City’s expert:

“Dr. Guidotti, testified that there is considerable epidemiological evidence to support a causative relationship between malignant melanoma of the skin and sunlight exposure (sunburn), but no similar evidence to support a causative connection between malignant melanoma and the inhalation of any substance.”
http://www.pacourts.us/assets/opinions/Supreme/out/opinion%20announcing%20judgment%20of%20the%20court%20%20reversedremanded%20%2010373870143091493.pdf#search=%22SCOTT%20SLADEK%20Supreme%2bCourt%27%22

Legal Lessons Learned: There are statutory presumption statutes in many states; some cover specific cancers, such as leukemia, non-Hodgkin lymphoma, brain cancer, bladder cancer, and gastrointestinal cancer. Other statutes do not specify the specific cancers, and epidemiological evidence may be required to win a workers comp claim.

PA: Q-SIREN LAWSUIT DISMISSED – DID NOT PROVE WAS “UNREASONABLY DANGEROUS”
On Aug. 20, 2018, in Ronald Dunlap and Carl Roel v. Federal Signal Corporation, et al., the Superior Court of Pennsylvania, held (2 to 1) that the trial court properly granted summary judgment to the siren manufacturer. The Court wrote:

“Plaintiff firefighters’ acoustics expert, Mr. Struck, presented an alternative siren design that would afford greater protection for firefighters from hearing loss by adding a Bromley Shroud, which would direct the noise to the front of the fire truck and away from the cab. However, he focused solely on the benefits of the shrouded design to the firefighters occupying the cab of the firetruck; he did not opine whether that design would protect the public.”


Legal Lesson Learned: Hearing loss is a serious issue in fire and EMS; hearing protection should be worn when the siren is activated.

PA: HEARING LOSS LAWSUIT DROPPED - PLANITIFF’S ATTORNEY MUST PAY DEF. ATTORNEY FEES

On June 20, 2018, in Gerald Carroll, et al. v. Federal Signal Corporation, et al., the U.S. Court of Appeals for the 3rd Circuit (Philadelphia) held (3 to 0) that plaintiffs’ attorney must pay $127,823.47 in attorney fees.

“Although attorneys’ fees and costs are typically not awarded when a matter is voluntarily dismissed with prejudice, we conclude that such an award may be granted when exceptional circumstances exist. Exceptional circumstances include a litigant’s failure to perform a meaningful pre-suit investigation, as well as a repeated practice of bringing meritless claims and then dismissing them with prejudice after both the opposing party and the judicial system have incurred substantial costs. Because such exceptional circumstances are present in this case, the District Court’s award will be affirmed.”

http://www2.ca3.uscourts.gov/opinarch/172183p.pdf

Legal Lessons Learned: Hearing loss is a real issue in fire & EMS - wear hearing protection.


https://www.audiology.org/sites/default/files/audiologytoday/AT%2024.6%20-%20LOW.pdf

MD: PART-TIME EMS INJURED FOOT ON DUTY – AVERAGE WEEKLY WAGE
On June 1, 2018, in *Justin Stine v. Montgomery County, Maryland*, the Court of Special Appeals of Maryland, held (3 to 0) that he is entitled to a jury trial to determine average weekly wage, which may include wages earned working for private ambulance company rather than merely the wage he earned as a part-time EMT in the 14-weeks prior to the injury. [https://caselaw.findlaw.com/md-court-of-special-appeals/1897275.html](https://caselaw.findlaw.com/md-court-of-special-appeals/1897275.html)

Legal Lesson Learned: helpful decision for part-time EMT, who has second part-time job while also going to school.

2-7

**U.S. Department of Justice: Improvements In Public Safety Officer Benefits Program**

On May 15, 2018, the U.S. Department of Justice issued Press Release, summarizing the following improvements:

- “Heart Attack, Stroke, and Vascular Rupture Claims: The new rule helps implement a change in the law that reduces the need in many cases for families to submit difficult-to-find and costly medical records for their loved ones. This regulatory change alone positively impacts nearly one-third of the PSOB death claims filed each year.
- Filing Process: The new rule includes administrative updates to make filing claims more straightforward and less burdensome for survivors and public safety agencies.
- Law Enforcement and Firefighter Trainees: Recognizing the dangerous nature of law enforcement and fire suppression, and the rigorous training required to help keep communities safe, the new rule clarifies the coverage of certain individuals fatally or catastrophically injured during formal training provided by law enforcement and fire academies.
- September 11th Exposure Claims: The new rule facilitates the PSOB Program’s medical examiners’ review of the nearly 150 claims pending for certain public safety officers who responded to the September 11th attacks to assist in rescue, recovery, and clean-up efforts, and who were exposed to hazards and toxins resulting from the attacks.”


Legal Lessons Learned: Hopefully these new rules will expedite review of pending claims, including claims by public safety officers who responded to the Sept. 11 terrorist attacks and were exposed to toxins.

2-6

**KY: LINE OF DUTY DEATH – “STEP CHILD” ENTITLED TO FREE TUITION AT STATE COLLEGES**

On June 1, 2018, in *Miles Devon Skeens v. University of Louisville*, the Commonwealth of Kentucky Court of Appeals (3 to 0) held that a stepchild qualifies as a “child” under Kentucky Revised Statutes (“KRS”) 164.2841

Legal Lesson Learned: Great decision; what was University of Louisville thinking?

2-5

VA: FIREMAN’S RULE – REFRIGERATOR EXPLODED – PD / VOL. FF CAN’T SUE MANUFACTURER

On April 13, 2018, in Brian Colbert v. Norcold, Inc., the U.S. Court of Appeals for the 4th Circuit held (3 to 0; unpublished opinion): “we agree with the district court: the Fireman’s Rule applies to products liability claims, and Norcold’s conduct was not willful or wanton.” http://www.ca4.uscourts.gov/Opinions/171419.U.pdf

LEGAL LESSONS LEARNED: Police officers and firefighters in Virginia can only seek workers comp (no damages for pain & injury, loss of consortium, etc.) unless proof of willful or wanton misconduct, or gross negligence, by the product manufacturer.

See also March 12, 2015 decision of 10th Circuit in Chester W. Peake v. Central Tank Coatings, where several Kansas firefighters were injured by exploding box of paint thinner: “The undisputed material facts are that several hours after Central Tank completed its work on the roof [of the city’s water tower] and left the site, the wooden members of the tower caught fire, fell to the ground, caught the surrounding grass on fire and eventually spread to the tires of the trailer. This domino chain of events was unforeseeable. *** A large, unmarked metal container box was mounted to the wood deck of the trailer. It was used by the crew to store various tools, oxygen/acetylene tanks, and other materials, including paint thinner.” The Court held that the firefighters could not sue the company for damages, since here is “no evidence that Central Tank knew that the storage of paint thinner was dangerous.” https://www.ca10.uscourts.gov/opinions/14/14-3157.pdf

See also this article about the Kansas case: “Notably, a sizable minority of states (18) do not currently apply the Fireman’s Rule… and have either explicitly declined to adopt, rejected, limited, or failed to address it…. These states are Alabama, Colorado, Florida, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia, and Wyoming.” file:///C:/Users/lawre/AppData/Local/Temp/0182139.PDF

2-4

NY: FDNY RECRUIT DIED DURING PHYSICAL EXERCISES – LAWSUIT DISMISSED - HEART CONDITION
On April 10, 2018, in Sherita Sears v. The City of New York, the Appellate Division of the Supreme Court of State of New York (5 to 0) denied the death claim, holding: “Plaintiff is not entitled to recover under GML § 205–a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27–a was designed to protect, but rather, arose from risks unique to firefighting work (Williams v. City of New York, 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004]).” https://caselaw.findlaw.com/ny-supreme-court-appellate-division/1893546.html

**Legal Lessons Learned: The New York statute requires proof of “neglect, omission, willful or culpable negligence.”**


New York Consolidated Laws, General Municipal Law - GMU § 205-a. Additional right of action to certain injured or representatives of certain deceased firefighters

“In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.”

2-3

**U.S. SUPREME COURT: LANDMARK DECISION ON QUALIFIED IMMUNITY – ONLY IF CLEAR CONSTITUTIONAL VIOLATION** [also filed, Chap. 1]

On April 2, 2018, in Andrew Kisela v. Amy Hughes, the U.S. Supreme Court reversed the 9th Circuit and held (7 to 2) the police officer who shot Amy Hughes should have been dismissed from the lawsuit:

“Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a
proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

LEGAL LESSONS LEARNED: Very helpful decision, not only for police officers, but for all emergency responders who may be sued arising out of split-second decisions. The 7-Justices sent a message that qualified immunity protects police officers from personal liability unless conduct clearly unjustified.

See New York Times article on this decision: “The court’s decision was unsigned and issued without full briefing and oral argument, an indication that the majority found the case to be easy.”


2-2

TX: MURDER TRIAL FOR KILLING A POLICE OFFICER – PD MAY BE AT TRIAL IN UNIFORM [also filed, Chap. 1]

On March 27, 2018, in Shelton Denoria Jones v. Lorie Davis, Director, Texas Department of Criminal Justice, the U.S. Court of Appeals for 5th Circuit, held (3 to 0) that the defendant was not deprived of a fair trial in state court: “the record before us does not suggest the police presence intimidated the jury or disrupted the factfinding process in any way.”

LEGAL LESSONS LEARNED: Helpful decision – no evidence of jury intimidation by having emergency responders in uniform, watching a jury trial. Before showing up in uniform, please discuss with your Chief and the prosecutor, who may want to review with trial judge, prior to start of trial.

2-1

PA: SEAGRAVE FIRE APPARATUS – INSURANCE COMPANIES MUST DEFEND ON HEARING LOSS CLAIMS

On March 26, 2018, in Seagrave Fire Apparatus, LLC v. CAN D/B/A Continental Casualty Company, et al., the Superior Court of Pennsylvania held (3 to 1) that several insurance companies that insured Seagrave must defend Seagrave under their contracts for firefighter hearing loss claims.

Legal Lessons Learned: Insurance companies are obligated per terms of their contracts to defend Seagrave against the many pending claims.
See, for example, this 2015 lawsuit filed on behalf of 34 New Jersey firefighters: file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/CTCRXJ99/Alvarez-v-American-LaFrance.pdf
3-27

IL: EXTRADITION - U.S. CITIZEN TO BE RETURNED TO IRELAND – LEFT IRISH BAR, CRASHED LEXUS KILLED TWO

On Nov. 3, 2020, In The Matter Of The Extradition Of Francis Carr, U.S. Magistrate Judge Beth W. Zantz, orders that Mr. Carr, who is held without bail in Chicago jail, may be extradited back to Ireland to face felony charges. The 1984 treaty between US and Ireland allows for extradition if the conduct is a felony [punishable more than one year] in both countries, even if in U.S. there must be proof of “gross negligence” for involuntary manslaughter or reckless homicide and in Ireland just ordinary negligence.

“For all of the reasons above, the Court therefore determines that the United States-Ireland treaty requires only dual criminality for an offense to be extraditable, meaning that just the charged conduct must be criminal and punishable by a year or more in prison in both jurisdictions.

Here, that requirement is met, as Carr concedes …. Carr allegedly drove in such a grossly negligent manner—at a high rate of speed and doing donuts—that he caused a crash and the deaths of his two passengers…. In Ireland, the offense of dangerous driving causing death of two victims is punishable by up to 10 years in prison…. And in the United States, Carr’s conduct could be charged as a felony under United States federal or Illinois state law, as involuntary manslaughter under 18 U.S.C. §1112 (maximum penalty of 8 years in prison), or as reckless homicide while driving a motor vehicle, 720 ILCS 5/9-3(a); 730 ILCS 5/5-4.5-40(a) (maximum penalty of 5 years in prison), respectively.”

https://www.casemine.com/judgement/us/5fa3a7514653d0732d5bedb1

Legal Lesson Learned: Treaties are to be interpreted liberally; defendant remains in jail until extradited back to Ireland.

3-26

NY: 911 CLEAN UP - 124 WORKERS CLEANUP AT STUYVESANT HIGH – LAWSUIT PROPERLY DISMISSED, ACCEPTED PRIOR SETTLEMENT

On Sept. 28, 2020, in In re: World Trade Center Lower Manhattan Disaster Site Litigation, the U.S. Court of Appeals for Second District (New York City) held in a Summary Order (3 to 0) that U.S. District Court Judge Alvin
K. Hellerstein properly dismissed their lawsuit in 2019 since it was moot; they are covered by settlement agreements with the City of New York and the WTC Captive by entering into the 2010 Final Settlement Agreement ("FSA"). Judge Hellerstein on Aug. 30, 2019 held that “All of the present plaintiffs, among a group of plaintiffs that at one time numbered around 11,000, had settled previously with the WTC Captive and its insureds, including the City of New York.”

Here, the district court properly held that Appellants’ 2010 settlement agreement with the WTC Captive and its insureds (the World Trade Center Litigation Final Settlement Agreement, or ‘FSA’) reduced their potential recovery in these proceedings to zero, and that, accordingly, their claims are moot.

Legal Lessons Learned: When you enter into a “global settlement” and accept the settlement money, it is designed to avoid future litigation such as this case.

Note: See Nov. 19, 2010 article, “Over 95% of Plaintiffs Accept World Trade Center Settlement.” “10,043 plaintiffs signed releases accepting settlement terms, according to the Allocation Neutral’s report to the Court, with 98% of those claiming some of the most severe injuries signing on. *** The WTC Captive Insurance Company confirms the 95% participation threshold of eligible plaintiffs has been reached.”

FL: “LONE WOLF” DEFENDANT HELD WITHOUT BOND - 23-YR-OLD – PISTOL, SILENCER, DRONE - WANTED TO KILL AT LEAST 50

On July 1, 2020, in United States of America v. Muhammed Momtaz Al-Azhari, U.S. District Court Judge Tom Barber, Middle District of Florida (Tampa Division), upheld the decision of U.S. Magistrate Judge denying defendant’s motion to revoke detention order. The Court wrote; “According to the [FBI] complaint, Defendant was preparing himself for a deadly attack in support of ISIS by obtaining weapons and tactical gear. He scouted potential targets, including a local beach and law enforcement buildings. He told a confidential informant that he did not want to kill just four or five people, but at least fifty. These allegations, and the evidence supporting the allegations, weigh heavily in favor of detention.”

3-25
**U.S. SUPREME COURT: FAST-TRACK DEPORTATION OF IMMIGRANTS CROSSING BORDER UPHOLD**

On June 25, 2020, in Department of Homeland Security, et al. v. Vijayakumar Thuraissigiam, the U.S. Supreme Court held (7 to 2) that Congress properly established a system of rapid deportation of aliens caught at the border, unless they can convince an immigration judge they had credible fear of persecution if returned to their home country. In this case, a Sri Lanka farmer was caught by Border Patrol crossing the border at 11 pm; he claimed he had been abducted and beaten in Sri Lanka by unknown men in a white van while working in his fields. One month after his arrest at the border he had a 13-minute hearing before an immigration judge and was ordered deported. He sought a writ of habeas corpus and hearing before a U.S. District Court Judge, which was denied, but U.S. Court of Appeals for 9th Circuit (San Francisco) reversed. Justice Samuel Alito wrote majority opinion: “Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming that they would be persecuted if returned to their home countries. Some of these claims are valid, and by granting asylum, the United States lives up to its ideals and its treaty obligations. Most asylum claims, however, ultimately fail, and some are fraudulent. In 1996, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009–546, it crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country. It was Congress’s judgment that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings. [https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf](https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf)

Legal Lessons Learned: The seven Justices found that the current system of immigration judges provides due process.


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**3-23**

**U.S. SUPREME COURT: DACA PROGRAM MAY NOT BE TERMINATED UNTIL DHS FOLLOWS APA – 700,000 ALIENS**

On June 18, 2020, in Department of Homeland Security v. Regents of the University of California, et al., the U.S. Supreme Court held (5 to 4) in an opinion by Chief Justice John Roberts, that the Trump Administration has not complied with the Administrative Procedures Act [notice of planned action, administrative hearings] in terminating the 2012 U.S. Department of Homeland Security program, established by President Obama. DACA [Deferred Action for Childhood Arrivals] has allowed 700,000 children of aliens to remain in the United States, request work authorization and be eligible for
Social Security and Medicare. Chief Justice Roberts wrote: “We do not decide whether DACA or its rescission are sound policies…. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.”
https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf

Legal Lessons Learned: This is a very “hot topic” that may in the future again be reviewed by the U.S. Supreme Court.

Note: See June 18, 2020 DHS statement:

U.S. DEPARTMENT OF HOMELAND SECURITY
Office of Public Affairs

DHS Statement On Supreme Court Decision on DACA

WASHINGTON- The Department of Homeland Security released the following statements regarding the Supreme Court decision on DACA.

Acting Secretary Chad Wolf: “DACA recipients deserve closure and finality surrounding their status here in the U.S. Unfortunately, today’s Supreme Court decision fails to provide that certainty. The DACA program was created out of thin air and implemented illegally. The American people deserve to have the Nation’s laws faithfully executed as written by their representatives in Congress—not based on the arbitrary decisions of a past Administration. This ruling usurps the clear authority of the Executive Branch to end unlawful programs.”

Acting Deputy Secretary Ken Cuccinelli: “The Supreme Court’s decision is an affront to the rule of law and gives Presidents power to extend discretionary policies into future Administrations. No Justice will say that the DACA program is lawful, and that should be enough reason to end it. Justice Clarence Thomas had it right in dissent: ‘Such timidity [by SCOTUS] forges the Court’s duty to apply the law according to neutral principles and the ripple effects of the majority’s error will be felt throughout our system of self-government.’”

NY: TERRORIST – FINGERPRINTS ON BOMB’S PACKING TAPE – CROSS EXAM. FBI EXAMINER NOT ON SPAIN CASE

On April 16, 2020, in United States of America v. Muhanad Mahmoud Al Farekh, the U.S. Court of Appeals for Second Circuit (New York) held (3 to 0) that trial judge properly reviewed FBI classified documents ex parte (without defense counsel), and properly prohibited defense counsel to cross-examination of FBI fingerprint examiner about another FBI fingerprint case 16 years earlier involving attacks on commuter trains in Madrid, Spain. [Note: In May, 2004, the FBI arrested Brandon Mayfield, and Oregon attorney, as a material witness in an investigation of the terrorist attacks on commuter trains in Madrid, Spain in March, 2004. The FBI Laboratory identified Mayfield’s fingerprint on a bag of detonators in Madrid. Two weeks after Mayfield’s arrest, the Spanish National Police identified an Algerian as the source of the fingerprint, and Mayfield was released from custody.]

“[T]he District Court did not preclude Al-Farekh from highlighting the possible subjectivity of, and potential flaws in, fingerprint evidence through his cross-examination of Sibley. To the contrary, Al-Farekh had the opportunity to do just that. Sibley testified, for example, about the ‘level of subjectivity in latent print comparisons’ and about the potential for mistakes by examiners in making false positive identifications. Other than being unable to rely on the Mayfield case and the report of the Department of Justice’s Office of Inspector General prepared on that case, Al-Farekh was free to attack Sibley’s methodology and fingerprint examinations as a type of evidence.” [Link to decision]

Legal Lessons Learned: Congress enacted the Classified Information Procedures Act to authorize federal judges to protect from public disclosure classified information. Regarding fingerprint examination, defense counsel may vigorously cross-exam expert witnesses, but not on a mistake by other FBI examiners that occurred 16 years prior.

Note: See DoJ, Inspector General report on the Spanish investigation: [Link to report]

MD: CIA / DOD – FORMER EMPLOYEES MUST HAVE “PRE-PUBLICATION REVIEWS” – LAWFUL, EVEN IF SLOW

On April 15, 2020, in Timothy H. Edgar, et al. v. Daniel Coats, et al., U.S. District Court Judge George J. Hazel, in a 57-page decision, granted the U.S. Government’s motion to dismiss. Each the five plaintiffs signed agency security agreements, requiring when the left government a prepublication review (“PRR”) of their books and other future publications. They each complained that CIA and other agencies took too long to conduct the reviews, and deleted too much information that may have been embarrassing to the government but was not classified. Judge Hazel
followed the U.S. Supreme Court’s precedent in Snepp v. United States, 444 U.S. 507 (1980), where Frank Sneep, a former CIA analyst in Saigon wrote a book in 1977 about the fall of Saigon, “Decent Interval” without getting prior clearance, and was ordered to turn over all proceeds from the book.

“While the allegations Plaintiffs have made about the inadequacies and breadth of the challenged PPR regimes do not appear inaccurate or implausible, Snepp remains the precedent governing the Court's evaluation of Plaintiffs' First Amendment claim, and Plaintiffs have failed to demonstrate that the regimes do not meet its low threshold of reasonableness. Accordingly, Plaintiffs' First Amendment claim will be dismissed.10

*** Footnote 10. It also bears mention that the wholesale reforms to PPR that Plaintiffs seek to obtain from the Court in this claim strain at the limits of the judiciary’s role, particularly given the national security context. See Egan, 484 U.S. at 530 (1988). Both that concern and the Court's inability to sidestep Snepp limit the force of arguments made in the amicus brief submitted by CERL, which describes how lengthy PPR delays chill contributions to public discourse by former officials and discourage national security experts from entering the government…. Whatever the merits of these assertions, they are more properly directed to the branches of government empowered to create and execute public policy rather than to simply evaluate its consistency with the Constitution.”

https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZkKd%2BuEYGTYr22oA9tv28Exj1jRAAAUPULjfVU2169

Legal Lessons Learned: Prepublication reviews are enforceable. per U.S. Supreme Court’s decision in in Snepp v. United States, 444 U.S. 507 (1980).

Note: When Frank Sneep was sued, he had already received about $60,000 in advance payments from his publisher. The U.S. Supreme Court held (6 to 3), “We agree with the Court of Appeals that Sneep’s agreement is an ‘entirely appropriate’ exercise of the CIA Director's statutory mandate to ‘protect[t] intelligence sources and methods from unauthorized disclosure,’ 50 U.S.C. § 403(d)(3). 595 F.2d at 932.”

https://supreme.justia.com/cases/federal/us/444/507/#tab-opinion-1953393

3-20

FL: ACTIVE SHOOTER - PULSE NIGHTCLUB – 49 KILLED, 53 INJURED – CAN’T SUE THE SECURITY GUARD COMPANY WHERE HE WORKED

On April 1, 2020, in Asael Abrad, et al. v. G4S Secure Solution (USA), Inc., the District Court of Appeal of Florida (Fourth District), held (3 to 0) that the trial court properly granted the security company’s motion to dismiss; the shooter worked for the security company for 10 years, and plaintiffs alleged that the company knew he expressed a desire to commit acts of mass murder against members of the general public, particularly against members of the lesbian, gay, bisexual and transgender community. The lawsuit was dismissed since plaintiffs did not “sufficiently allege a legal duty owed by G4S.”

“Appellants also concede that Mateen did not use weapons owned or controlled by G4S, but instead, weapons purchased by him on his private time. Appellants’ argument that by fraudulently assisting Mateen
in obtaining a Class G license—which in turn was helpful in purchasing the weapons used—is legally irrelevant…. Finally, Appellants’ duty arguments fail for one more important reason: Appellants fail to provide any sort of limitation on the legal duty they seek to impose. Failing to provide any sort of boundary for the employer would have severe public policy implications. As both G4S and the trial court noted, Appellants’ failure to provide any sort of spatial or temporal limits in the articulation of their concept of duty would essentially result in G4S being strictly liable and an absolute guarantor of Mateen’s behavior while off duty at all times. See Garcia v. Duffy, 492 So. 2d 435, 439 (Fla. 2d DCA 1986) (‘Once liability began to be imposed on employers for acts of their employees outside the scope of employment, the courts were faced with the necessity of finding some rational basis for limiting the boundaries of that liability; otherwise, an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against any person under any circumstances. Such unrestricted liability would be an intolerable and unfair burden on employers.’).


Legal Lessons Learned: Tragic event, but very difficult to hold employer liable for off-duty conduct of shooter.

3-19

CA: ILLEGAL IMMIGRANTS CROSSING US BORDER - SENT BACK TO MEXICO – INJUNCTION AGAINST FED. PROGRAM UPHELD BY 9th CIR.

On Feb. 28, 2020, in Innovation Law Lab v. Chad Wolf, Acting Secretary of Homeland Security, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (2 to 1) that the nationwide preliminary injunction issued by a U.S. District Court judge, against the Federal Government’s new Migrant Protection Protocols (“MPP”), will remain in place.

“The MPP has had serious adverse consequences for the individual plaintiffs. Plaintiffs presented evidence in the district court that they, as well as others returned to Mexico under the MPP, face targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States. The hardship and danger to individuals returned to Mexico under the MPP have been repeatedly confirmed by reliable news reports.”


Legal Lessons Learned: The Federal Government may now ask for all the judges on the 9th Circuit (“en banc”) to hear their appeal, or seek an appeal to the U.S. Supreme Court (requires vote of 4 of 9 Justices to take the case).
NY: SANCTUARY CITIES — 2nd CIRCUIT UPHOLDS FED. GOV’T RIGHT TO DENY GRANTS TO STATES / CITIES

On Feb. 26, 2020, in The State of New York, Connecticut, New Jersey, Washington, Massachusetts, Virginia, Rhode Island, and City of New York v. United States Department of Justice, the U.S. Court of Appeals for the Second Circuit (New York), held (3 to 0) that the Federal Government has the statutory right to withhold Edward Byrne Memorial Program* Criminal Justice Assistance grants from sanctuary states and municipalities, setting aside an injunction issued in 2018 by a U.S. District Court judge. [*Court in its decision, Footnote 2: “The Byrne Program is named for New York City Police Officer Edward Byrne who, at age 22, was shot to death [Feb. 26, 1988] while guarding the home of a Guyanese immigrant cooperating with authorities investigating drug trafficking. The case is well known in this circuit, where five persons were convicted in the Eastern District of New York for their roles in Byrne’s murder. Among these was Howard ‘Pappy’ Mason, a drug dealer who, from his New York State prison cell, ordered subordinates to kill a police officer in retaliation for Mason’s own incarceration.”]

“The principal legal question presented in this appeal is whether the federal government may deny grants of money to State and local governments that would be eligible for such awards but for their refusal to comply with three immigration-related conditions imposed by the Attorney General of the United States. Those conditions require grant applicants to certify that they will (1) comply with federal law prohibiting any restrictions on the communication of citizenship and alien status information with federal immigration authorities, see 8U.S.C.§1373; (2) provide federal authorities, upon request, with the release dates of incarcerated illegal aliens; and (3) afford federal immigration officers access to incarcerated illegal aliens.

*** For reasons explained in this opinion, we conclude that the plain language of the relevant statutes authorizes the Attorney General to impose the challenged conditions.


Legal Lessons Learned: Sanctuary cities are a “hot” political issue; the states who brought this lawsuit may now request U.S. Supreme Court to hear their appeal (requires vote of 4 of 9 justices for the Court to hear an appeal). Federal appeals courts in Philadelphia, Chicago and San Francisco have upheld injunctions against these federal restrictions.


3-17

NY: TERRORIST – ATTACKED FBI AGENT, 8-INCH KNIFE – PLED GUILTY – 2nd Cir: 17 YRS IN PRISON NOT ENOUGH
On Dec. 27, 2019, in United States of America v. Fareed Mumuni, the U.S. Court of Appeals for Second Circuit (NYC), held 2 to 1 that U.S. District Court judge must re-sentence the convicted terrorist.

“In this terrorism case, the Government appeals the substantive reasonableness of the sentence imposed on Defendant-Appellee Fareed Mumuni (‘Mumuni’). He was convicted of, inter alia, conspiring to provide material support to the Islamic State of Iraq and al-Sham (‘ISIS’) and attempting to murder a federal agent in the name of ISIS. His advisory sentence under the United States Sentencing Guidelines (‘Guidelines’ or ‘U.S.S.G.’) was 85 years’ imprisonment. The sole question on appeal is whether the United States District Court for the Eastern District of New York (Margo K. Brodie, Judge) erred—or ‘abused its discretion’—by imposing a17-year sentence, which constitutes an 80% downward variance from Mumuni’s advisory Guidelines range. We conclude that it did. Accordingly, we REMAND the cause for resentencing consistent with this opinion.”

Legal Lessons Learned: Very important decision that will hopefully influence other Federal sentencing judges nationwide.

3-16

CA: NO FLY LIST – FOUR U.S. CITIZENS ON THE LIST - TSA’s ANTI-TERRORIST PROGRAM PROVIDES DUE PROCESS RIGHTS

On Oct. 21, 2019, in Faisal Nabin Kashem; Raymond Earl Knaeble IV; Amir Meshal; Stephen Durga Persuad v. William Barr, Attorney General, the U.S. Court of Appeals for the 9th Circuit (San Francisco), upheld (3 to 0) the No Fly List.

“The plaintiffs are on the No Fly List, which prohibits them from boarding commercial aircraft flying to, from or within the United States or through United States airspace. They challenge, under the Due Process Clause of the Fifth Amendment to the United States Constitution, both their inclusion on the No Fly List and the sufficiency of the procedures available for contesting their inclusion on the list. Specifically, the plaintiffs argue (1) the criteria for inclusion on the No Fly List are unconstitutionally vague; (2) the procedures for challenging inclusion on the list fail to satisfy procedural due process; and (3) their inclusion on the list violates their substantive due process rights. The district court granted summary judgment to the government on the vagueness and procedural due process claims and dismissed the substantive due process claims for lack of jurisdiction under 49 U.S.C. § 46110. We affirm.”

Legal Lessons Learned: The TSA program provides written notice to individuals why they are on the No Fly list, and an administrative and judicial appeal process.
CO: TERRORIST SENTENCED LIFE FED. MAX PRISON – TRIED BLOW UP PLANE IN DETROIT – COMPLAINTS ABOUT PRISON DISMISSED

On Sept. 18, 2019, in Umar Farouk Abdulmutallab v. William Barr, Attorney General of the United States, U.S. District Court Judge Raymond P. Moore, United States District Court of Colorado, upheld the recommendations of U.S. Magistrate Judge that the prisoner’s claims should be dismissed for failure to exhaust his U.S. Bureau of Prisons administrative remedies. https://www.leagle.com/decision/infdco20190919804

Judge Moore wrote:

“Plaintiff was convicted for the attempted use of a weapon of mass destruction on a commercial airliner that landed in Detroit, Michigan, and the attempted murder of the 289 people on board. Plaintiff is from Nigeria and a Muslim. Plaintiff is housed at the United States Penitentiary-Administrative Maximum (‘ADX’) in Florence, Colorado, and serving four terms of life imprisonment plus 50 years for his convictions. Prior to Plaintiff’s transfer to ADX, in March 2012, the United States government placed Plaintiff under Special Administrative Measures (‘SAMs’). The SAMs have been renewed every year, with some modifications.

***

“As Plaintiff acknowledges, ‘[t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution.’ (ECF No. 128, p. 5 (quoting Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009).) Thus, in the absence of a prisoner alerting a prison of the problem which he alleges in his complaint, such allegation is not exhausted and cannot serve to support the prisoner's claim or claims. As applied to the recommendation of dismissal here, this objection is overruled.”

Legal Lessons Learned: Nice to read about a life sentence of this terrorist to the Federal max prison.

U.S. SUPREME CT: NEW U.S. GOV’T ASYLUM RULES REMAIN IN EFFECT – REFUGES FIRST APPLY TO MEXICO – NO INJUNCTION

On Sept. 11, 2019, in William Barr, Attorney General v. East Bay Sanctuary Covenant, the majority of Justices (7 to 2) issued an Order granting U.S. Government’s request for a stay of a nationwide injunction issued by U.S. District Court judge Jon Tigar in San Francisco, after the injunction was modified to only apply to California & Arizona, by a 3-judge panel the U.S. Court of Appeals for 9th Circuit (San Francisco). https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf
“The district court’s July 24, 2019 order granting a preliminary injunction and September 9, 2019 order restoring the nationwide scope of the injunction are stayed in full pending disposition of the Government’s appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government’s petition for a writ of certiorari, if such writ is sought.”

Legal Lessons Learned: The case, now pending before a Federal Judge in California, will most likely then go to the 9th Circuit, and eventually then reach the U.S. Supreme Court.

See Sept. 11, 2019 article: “President Trump tweeted that the ruling was a "BIG United States Supreme Court WIN for the Border on Asylum!” The administration had argued in a brief to the Supreme Court that unless the injunctions were totally lifted everywhere, it ‘would severely disrupt the orderly administration of an already overburdened asylum system.’”  https://www.foxnews.com/politics/supreme-court-green-lights-trumps-immigration-asylum-ban

3-13

PA: HIGH SCHOOL STUDENT EXPELLED – THREATENING COMMENT – “BEAT RECORD OF 19” OF PARKLAND, FL

On Sept. 10, 2019, in In The Interest Of: J.J.M, A Minor, the Superior Court of Pennsylvania, 2019 PA Super 277, upheld (3 to 0) the Juvenile Court judge’s finding of “delinquency adjudication for terrorist threats.”

Judge Mary Jane Bowles wrote:

“Appellant’s statement was uttered six days after seventeen victims were killed at Marjory Stoneman Douglas High School in Parkland, Florida, eclipsing the Columbine High School shooting as the most deadly high school shooting in United States history. *** Further, we conclude that the evidence sufficiently established that Appellant made his threat with reckless disregard for the risk that it would cause terror. Again, the facts are that, while the news was dominated by the deadliest high school shooting in this country’s history, Appellant proclaimed in a high school hallway, between classes, loud enough for other students to hear, that he wanted to ‘beat the record of 19.’ We do not hesitate to conclude that Appellant consciously disregarded a substantial and unjustifiable risk that his threat would terrorize his fellow students. See18 Pa.C.S. §302(a)(3) (defining recklessness).”

http://www.pacourts.us/assets/opinions/Superior/out/j-s12006-19o%20-%202010413599977313050.pdf#search=%22Interest%20of%20J.J.M.%22

Legal Lessons Learned: Great decision – school administrators need to repeatedly remind students to report any threatening behavior. See 9/12.2019 article on this case: “Court: Student’s Claim to Want to ‘Beat the Record’ Following Parkland Shooting Was Terroristic Threat.”

https://www.law.com/thelegalintelligencer/2019/09/12/court-students-claim-to-want-to-beat-the-record-following-parkland-shooting-was-terroristic-threat/
NY: 2nd CIRCUIT – DEPORTATION OF OUTSPOKEN ACTIVIST SUSPENDED - “OUTRAGEOUS COMMENTS” BY ICE DIRECTOR

On April 25, 2019, in Ravidath Ragbir v. Thomas D. Homan, Director of ICE, the U.S. Court of Appeals for 2nd Circuit, held (2 to 1) that deportation order is suspended of the outspoken Executive Director of the New Sanctuary Coalition (which works to protect New York immigrant families from deportation). Congress cannot deprive federal courts of power to hold habeas corpus hearings when there is alleged violation of free speech under First Amendment. “To allow this retaliatory conduct to proceed would broadly chill protected speech, among not only activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others. In short, the Government’s alleged conduct plausibly fits within the ‘outrageous [ness]’ exception to AADC.”


Legal Lessons Learned: Inappropriate comments by governmental officials can be viewed as deprivation of Constitutional rights of individuals.

See article about the decision: “Split 2nd Circuit Panel Finds ‘Outrageous’ ICE Conduct Revives Activist’s Removal Suit.”

CT: WIDOW OF 9/11 VICTIM AT WORLD TRADE CENTER – $1.2 MILLION FED. FUNDS DAUGHTER – WIDOW CONTROLS – NOT PROBATE COURT

On April 16, 2019, in Carolyne Y. Hynes v. Sharon M. Jones, the Connecticut Supreme Court (7 to 0) held that the widow had full control of the federal dollars paid to her daughter, and did not need Probate Court guardian ad litem approval for spending of these funds.“We conclude that our state statutes did not grant the Probate Court jurisdiction to monitor the plaintiff’s use of the fund award or to prohibit the plaintiff from using that award in the absence of that court’s approval.”


Legal Lessons Learned: Widow now has full discretion on how to spend funds granted to her minor child.
CT: SANDY HOOK ELEMENTARY SCHOOL - LAWSUITS MAY PROCEED / VIOLENT ADS BY GUN MFG.

On March 14, 2019 in Donna L. Soto, Administratrix (Estate of Victoria L. Soto), et al. v. Bushmaster Firearms International, et al., the Connecticut Supreme Court (4 to 3) reinstated the lawsuit brought by families of nine of the 20 children and six adults killed in the elementary school. The Court held:

“The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior.”

Legal Lessons Learned: The case will not be sent back for trial or settlement by Remington Arms Co. LLC and its “daughter company” Bushmaster Firearms International LLC.

PA: SANCTUARY CITY / ICE - 3rd CIRCUIT HOLDS FED. GOVT CANNOT WITHHOLD FORMULA GRANT

On Feb. 15, 2019, in City of Philadelphia v. Attorney General Of The United States Of America, the U.S. Court of Appeals held (3 to 0):

“Concluding that Congress did not grant the Attorney General this authority, we hold that the Challenged Conditions were unlawfully imposed. Therefore, we will affirm the District Court’s order to the extent that it enjoins enforcement of the Challenged Conditions against the City of Philadelphia. We will vacate part of the order, however, to the extent that it exceeds the bounds of this controversy.”

Legal Lessons Learned: The DoJ is likely to seek review by U.S. Supreme Court.

NY: JUVENILE TERRORIST – CAN’T DEPORT, BECAME U.S. CITIZEN WHEN FATHER BECAME CITIZEN

On Sept. 13, 2018, in Mohammed Khalid v. Jefferson Sessions, U.S. Attorney General, the U.S. Court of Appeals for Second Circuit [N.Y.], held (3 to 0): “We hold that the short, temporary physical separation caused by Khalid’s time in federal pretrial juvenile detention did not strip Khalid’s father of his ‘physical custody’ of Khalid as that

Legal Lessons Learned: Citizenship is a great privilege. Congress needs to consider revising the Immigration laws so that those convicted of terrorism are not automatically granted citizenship when their parent becomes a citizen.

See article, “Mohammad Hassan Khalid given five years in jail for his part in jihadist plot,” Khalid, the youngest person at 15 to be prosecuted for terrorism in the US, found guilty of involvement in conspiracy by 'Jihad Jane' to kill Swedish artist. Khalid, a Pakistani migrant living in Maryland, was 15 years old when he first began chatting on the internet with Colleen LaRose, the Philadelphia housewife who called herself “Jihad Jane”. LaRose, who is serving a 10-year prison sentence for her part in the conspiracy, drew him into a plan to kill the Swedish artist Lars Vilks, who had drawn the head of the prophet Muhammad on the body of a dog. [https://www.theguardian.com/world/2014/apr/17/mohammad-hassan-khalid-sentence-five-years-jail-jihad-jane-plot](https://www.theguardian.com/world/2014/apr/17/mohammad-hassan-khalid-sentence-five-years-jail-jihad-jane-plot)

U.S. SUPREME COURT: PRESIDENT TRUMP’S “TRAVEL BAN” ON 8 NATIONS LAWFUL

On June 26, 2018, in Trump, President Of The United States v. Hawaii, et al., the U.S. Supreme Court (5 to 4), in decision by Chief Justice Roberts, held that President has the authority under federal statutes to ban travel to USA of citizens from 8 countries with weak travel clearance processes: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.

“By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs’ attempts to identify a conflict with other provisions in the INA, and their appeal to the statute’s purposes and legislative history, fail to overcome the clear statutory language.” [https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf)

Legal Lessons Learned: The Congress has granted President great powers to protect our national security.

U.S. SUPREME COURT – TO OBTAIN CELL PHONE DATA ON SUSPECT, NEED “PROBABLE CAUSE” – EXCEPTION FOR EMERGENCIES

On June 22, 2018, in Timothy Carpenter v. United States, the U.S. Supreme Court (5 to 4) held that a U.S. Magistrate improperly issued an order to two cell phone companies under the Stored Communications Act; the FBI was investigating a series of armed robberies in Michigan and Ohio, and obtained 127 days of cell-site location information (CSLI) on the lead suspect. Court majority held that the FBI agents should have sought a search warrant, which have required an affidavit showing probable cause. “Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable...
“In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies. *** Federal Magistrate Judges issued two orders directing Carpenter’s wireless carriers—Metro PCS and Sprint—to disclose ‘cell/site sector [information] for [Carpenter’s] telephone[ ] at call origination and at call termination for incoming and outgoing calls’ during the four-month period when the string of robberies occurred…. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter’s phone was ‘roaming’ in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day. *** The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show ‘reasonable grounds’ for believing that the records were ‘relevant and material to an ongoing investigation.” 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. *** Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber’s CSLI, the Government’s obligation is a familiar one—get a warrant.”

Legal Lessons Learned: The Court recognized an exception for emergencies; bomb threats; active shootings; child abductions. “As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.”


NY: EMPLOYEES OF BATTERY PARK CITY AUTHORITY MAY SUE BUILDING OWNER FOR 9/11 INJURIES

On June 6, 2018, in In Re: World Trade Center, Lower Manhattan Disaster Site Litigation, the U.S. Court of Appeals for Second Circuit held (3 to 0) that 18 workers who became sick as a result of working in lower Manhattan after the Sept. 11 terrorist attacks may proceed with their lawsuit against building owner, the public benefit corporation Battery Park City Authority. The 2nd Circuit decision followed confirmation by State of New York’s highest court (NY Court of Appeals) that the 2009 “Jimmy Nolan” statute (named after recovery worker) allowing
time-barred lawsuits for one additional year against public benefit corporations was lawful.  
http://www.ca2.uscourts.gov/decisions/isysquery/8c537d01-8133-4435-b4f6-e87aa585d8e4/1/doc/15-2181_opn_2.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/8c537d01-8133-4435-b4f6-e87aa585d8e4/1/hilite/

Legal Lessons Learned: The 18 workers will finally get their day in court, or will negotiate a settlement.  There reportedly have been 12,000 claims settled against various defendants.  

3-4

**PA: PHILADELPHIA IS “SANTUARY CITY” - WINS INJUNCTION – ENTITLED FED. POLICE GRANT**

On June 6, 2018, in *The City of Philadelphia v. Attorney General of United States*, a federal judge has issued an 89-page opinion holding that $1.6 million in police grant funds may not be withheld.  

Legal Lessons Learned: The U.S. Department of Justice will likely appeal this decision to the 3rd Circuit.  Fire & EMS must likewise deal with aliens, and Congress needs to enact legislation concerning 11 million undocumented aliens.

3-3

**U.S. SUP. COURT: DRUG DEALER E-MAILS STORED BY MICROSOFT IN IRELAND – CASE MOOT**

On March 30, 2018, in *Microsoft Corp. v. United States*, the U.S. Solicitor General has filed a motion asking the Court to dismiss the case as moot, and advised the Court that DoJ has obtained a new search warrant against Microsoft for e-mails stored in their facility in Ireland under the new “Cloud Act.” The Solicitor General wrote, “The CLOUD Act resolves the question presented by specifying that a service provider responding to a Section 2703 order must produce information within its ‘possession, custody, or control, regardless of whether such * * * information is located within or outside of the United States.’” The United States has obtained a new warrant under the CLOUD Act, and Microsoft’s sole objection—that the prior warrant was impermissibly extraterritorial—no longer applies. The United States respectfully submits that this case is now moot.”

https://supreme.justia.com/cases/federal/us/584/17-2/
LEGAL LESSONS LEARNED: Congress has enacted the “Cloud Act” so that search warrants on Microsoft and other companies must be honored, even if the e-mail information is stored in a facility outside the USA. In some case, our national security demands access to this information.

NY: NYPD SURVEILLANCE OF MUSLIMS – FOIA - DO NOT NEED TO EVEN DISCLOSE RECORDS EXIST
On March 29, 2018, In the Matter of Talib W. Abdur-Rashid and Samir Hashmi v. New York City Police Department, et al., the State of New York Court of Appeals held (4 to 3):

“The issue presented is whether an agency may decline to acknowledge that requested records exist in response to a Freedom of Information Law request … when necessary to safeguard statutorily exempted information. Under these circumstances, we hold that it may and therefore affirm the Appellate Division order, which reached the same conclusion.”

file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/XO250S7T/Glomar-decision.pdf

LEGAL LESSONS LEARNED: Surveillance records are protected from disclosure; don’t need to even confirm existence of intelligence records.

See article on this decision: https://www.law.com/newyorklawjournal/2018/03/29/ny-high-court-allows-nypd-to-evade-giving-foil-requested-information-about-muslim-surveillance/

U.S. SUP. COURT: HAMAS BOMBINGS IN ISRAEL – CAN’T SEIZE ANCIENT IRANIAN TABLETS IN CHICAGO
On Feb. 21, 2018, in Rubin v. Islamic Republic of Iran, the U.S. Supreme Court held (8 to 0; Justice Kegan did not participate) that 30,000 ancient clay tablets held at University of Chicago cannot be seized to pay $71.5 million judgement against Iran. Justice Sotomayor wrote,

“Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism related judgments, however, it does so expressly. See §§1605A, 1610(a)(7), (b)(3), (f)(1)(A); §201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for §1605A judgment holders absent a clearer indication of Congress’ intent.”

file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/XO250S7T/16-534_6jfm.pdf

LEGAL LESSONS LEARNED: Congress can amend FSIA to clarify that Iran is a sponsor of terrorists, and their property in USA can be subject to seizure.
See article on the decision: “Wednesday’s ruling is also likely to dictate the outcome of a similar dispute pending before the justices in which four different groups of plaintiffs representing those injured in other allegedly Iran-backed attacks are seeking to enforce court judgments by seizing $17.6 million in assets held by Iranian government-owned Bank Melli.” https://in.reuters.com/article/usa-court-iran/u-s-top-court-forbids-seizure-of-ancient-persian-artifacts-idINKCN1G51ZY
Chap. 4  Incident Command, including Training, Drones

4-12

File: Chap. 4, Incident Command, Training

NY: FDNY TRAINING APARTMENT BLDG BEING REHABED – STILL FEW RESIDENTS, DOORS FORCED OPEN – CASE DISMISSED

On Nov. 25, 2020, in Henry Brown, et al. v. Fire Department of City of New York, the City of New York, et al., U.S. District Court Judge Lashann Dearcy Hall, U.S. District Court for Eastern District of New York, granted the City’s motion to dismiss; there was no proof that the City was on notice of any deficiencies in the FDNY’s training conducted April – June, 2016 in the 23-unit apartment building (five plaintiffs still lived in the building). The training exercises included breaking down doors and entering apartments, and led to two incidents of forcible, warrantless entry into Plaintiffs’ apartments.

“Here, Plaintiffs allege that City Defendants failed to train FDNY officers how to ‘properly distinguish occupied from vacant apartments in the context of emergency entry training exercises.’ (Am. Compl. ¶¶ 53, 113.) The complaint contains two allegations of constitutional violations: the warrantless entries by FDNY Officers into Plaintiff Moyer’s apartment on May 17, 2016, and Plaintiff Henry Brown’s apartment on May 21, 2016…. However, there are no allegations that indicate that City Defendants were on notice that the training of FDNY officers was deficient. Plaintiff Moyer did call the police after the FDNY allegedly entered her home because she thought they had been robbed…. However, there is no plausible inference that her call to the police to report a robbery put the City Defendants on notice that the training of FDNY officers was deficient. Plaintiff Henry Brown filed a complaint at the local fire house and complained to Brooklyn Community Board #8 after the alleged unlawful entrance into his home….. However, any such complaints, which were made after the alleged warrantless entries into Plaintiffs' homes, could not be said to have put the City Defendants on notice of training deficiencies prior to the alleged unconstitutional conduct.”

https://docs.justia.com/cases/federal/district-courts/new-york/nyedce/1:2019cv02400/432390/46

Legal Lesson Learned: No constitutional violations, but training in a partially occupied apartment building presenting some obvious “challenges” for training officers and the participating firefighters.

4-11

NY: PAPER MILL FIRE – DECK GUN – DISCHARGED OVER TOP OF HYDROELECTRIC FACILITY – NO LIABILITY FOR DAMAGE

On Nov. 25, 2020, in Stevens & Thompson Paper Company, Inc. v. Middle Falls Fire Department, Inc., et al. the Appellate Division of the Supreme Court of the State of New York, held (5 to 0) that the trial court properly granted
summary judgment to the FD and the Village of Greenwich, and the Town of Greenwich under the governmental immunity doctrine.

“The key issue is therefore whether the fire department defendants' purportedly negligent acts — choosing to use the deck gun and aim it in a direction that caused a rain to fall around the powerhouse — were discretionary in that they arose from ‘the exercise of reasoned judgment which could typically produce different acceptable results’ (Tango v Tulevech, 61 NY2d 34, 4).

***

Moreover, although the selected direction of the deck gun caused a rain or mist to fall upon the powerhouse when it was in use, the firefighters had no reason to anticipate that this would affect the interior of the powerhouse. A surveillance video of the area shows wet ground, but no flooding, and it appears that water that drained into an outdoor catch basin as designed then seeped into the powerhouse through a masonry joint. Further, although one could reasonably question the efficacy of the firefighters' efforts to reorient the deck gun once they learned of that problem, the efficacy of those efforts are irrelevant given that their activities caused no further seepage into the powerhouse.”


Legal Lesson Learned: Discretionary acts by fire department are protected by governmental immunity.

4-10

CA: KOBE BRYANT DEATH – NEW CA STATUTE – CRIME FOR EMERGENCY RESPONDERS TAKE PHOTOS WITH PERSONAL DEVICES

Sept. 28, 2020: CA - Gov. Newsom Signs New Law Prompted By Photo Scandal In Crash That Killed Kobe Bryant, 8 Others In Calabasas - Gov. Gavin Newsom has approved legislation prompted by the helicopter crash that killed Kobe Bryant and eight others in Calabasas earlier this year. The bill signed Monday makes it a crime for first responders to take unauthorized photos of deceased people at the scene of an accident or crime. Reports surfaced after the Jan. 26 crash that graphic photos of the victims were being shared by eight deputies. Los Angeles County Sheriff Alex Villanueva said the department has a policy against taking and sharing crime scene photos, but it does not apply to accident scenes. Vanessa Bryant has sued the sheriff in a lawsuit seeking damages for negligence, invasion of privacy and intentional infliction of emotional distress. https://ktla.com/news/local-news/gov-newsom-signs-new-law-prompted-by-photo-scandal-in-crash-that-killed-kobe-bryant-8-others-in-calabasas/

CA Law: 647.9: (a) A first responder, operating under color of authority, who responds to the scene of an accident or crime and captures the photographic image of a deceased person by any means, including, but not limited to, by use of a personal electronic device or a device belonging to their employing agency, for any purpose other than an official law enforcement purpose or a genuine public interest is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000) per violation. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2655

Legal Lesson Learned: Fire & EMS departments should have a policy or SOG regarding taking photos at scenes.
For example, see Yakima County, WA Fire District 12 policy: “All personnel are permitted to photograph an incident scene so long as the photograph is taken with a Department issued camera. a. Personal devices: cell phone cameras, video cameras, digital cameras and film cameras are not permitted to take on scene photos at any time by any member.” [http://www.westvalleyfire.com/default.asp?pageid=188&deptid=1]

**4-9**

**MD: PG COUNTY FIRE CHIEF – BATTALION CHIEFS TO OUTRANK VOLUNTEER CO. CHIEF - AUTHORIZED**

On Aug. 4, 2020, in Prince George’s Volunteer Fire And Rescue Association, Inc. v. Prince George’s County, Maryland, the Court of Special Appeals of Maryland, held (3 to 0; unreported decision) that the County Fire Chief had the authority in 2016 to issue revised General Order 01-03 that elevated the rank of County Battalion Chiefs, over that of Chiefs of volunteer fire companies.

“Ultimately, PGCVFRA failed to sufficiently allege that it suffered irreparable injury through the Fire Chief's revision of General Order 01-03 and its amendment of the chain of command. As noted in our discussion on PGCVFRA's governmental takings claim, PGCVFRA failed to establish any sort of injury. Its claims regarding potential injury are hypothetical, speculative, and depend on future—uncertain—conduct that PGCVFRA alleges the County may undertake. The speculative nature of these complaints is apparent, and these ‘mere allegations’ are insufficient to ground PGCVFRA's claim for permanent injunctive relief.” [https://www.courts.state.md.us/sites/default/files/unreported-opinions/0614s19.pdf]

**Legal Lessons Learned: The County Fire Chief has authority over firefighting and chain of command.**

Note: Under revised General Order 01-03, the relevant portion of the chain of command reads as follows:

1. County Fire Chief
2. Chief Deputy
3. Deputy Fire Chief
4. Assistant Fire Chief, Career/Volunteer
5. Battalion Chief, Career/Volunteer
6. Volunteer Company Chief

[Footnote 8 of the Court’s decision.] [https://www.courts.state.md.us/sites/default/files/unreported-opinions/0614s19.pdf]
MD: FREELANCING – OFF DUTY VOL. FF - STRUCTURE FIRE – FIRED – CAN’T APPEAL TO COUNTY PERSONNEL BOARD

On April 9, 2020, in Ricardo Hinson v. Personnel Board Of Prince George’s County, the Court of Special Appeals of Maryland, held (3 to 0) in an unpublished opinion that the trial court properly dismissed the volunteer firefighter’s case; volunteers serve at will of FD, no right to hearing before County Personnel Board.

“The dispositive question in this case is whether the County Code has granted volunteer firefighters the right to appeal disciplinary actions to the Personnel Board. We agree with the County and the Personnel Board that Hinson, as a volunteer firefighter, was not a County employee who had the right to appeal a personnel decision to the Personnel Board. Consequently, the Personnel Board did not commit legal error in dismissing Hinson’s appeal.”

https://www.courts.state.md.us/sites/default/files/unreported-opinions/1702s17.pdf

Legal Lessons Learned: Volunteer firefighters serve “at will” in most states, with no right to appeal to a County review board. “Freelancing” can have deadly results.

NY: MASSIVE GAS LEAK – FDNY NOT EVACUATE HOUSES - BASEMENT LIGHT SWITCH, EXPLOSION – GOV. IMMUNITY

On Feb. 11, 2020, in State Farm Fire & Casualty Insurance Company, a/s/o Charles Caccse v. The Brooklyn Union Gas Company, d/b/a National Grid New York, and second lawsuit of State Farm v. The City of New York and FDNY, 2020 NY Slip Op 30876(U), Judge Tomas P. Aliotta, Supreme Court of New York (County of Richmond), granted the City & FD’s motion to dismiss, since FDNY was performing governmental function involving discretionary judgments, and owed no “special duty” to the injured homeowner. The lawsuit against the gas company for defective gas mains may proceed.

“[I]n the opinion of this Court, the City and the FDNY have met their prima facie burden of establishing their right to judgment as a matter of law by submitting satisfactory proof regarding their claim of governmental function immunity and that no special duty existed between them and the plaintiffs. In opposition, plaintiffs have failed to rebut that showing and raise a triable issue of fact (see Zuckerman v. City of New York, 49 NY2d 557 [1980]). ‘When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose’ (Applewhite v. Accuhealth, Inc., 21 NY3d 420, 425 [2013]). If a municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty (see Applewhite, 21 AD3d at 426). Since police and fire protection are examples of long-recognized, quintessential governmental functions’ (Matter of World Trade Ctr Bombing Litig., 17 NY3d
428 [2011]), plaintiff must plead and prove the existence of a special duty beyond the obligation owed to the public at large (see Valdez v. City of New York, 18 NY3d 69 [2011]).

https://public.fastcase.com/W1%2B2t%2BeVuI35%2FN70vAMFZn8FExk2ons8UFiGzSPZ61g%2B2pF54RtCKp9IHiewQM23

Legal Lessons Learned: Governmental immunity for discretionary decisions at an emergency scene is a very important legal doctrine.

4-6

**TN: GREAT SMOKEY MOUNTAIN FIRE – GATLINBURG NOT WARNED – KILLED 14 – LAWSUIT MAY PROCEED**

On Dec. 9, 2019, in Michael Reed v. United States, Senior U.S. District Court Judge Thomas W. Phillips, Eastern District of Tennessee (Knoxville Division), denied the U.S. Government’s motion to dismiss, since Federal Tort Claims Act allows lawsuit since the National Park Services’ “Fire Management Plan has mandatory mitigation actions to protect life and property (duty to warn).

“Section 3.3.2(C) of the FMP [Fire Management Plan] states that ‘[f]irefighter and public safety is the first priority in all fire management activities[,]’ and specifies that ‘Park neighbors, Park visitors and local residents will be notified of all planned and unplanned fire management activities that have the potential to impact them.’ [Id. at 28 (emphasis added)]. Additionally, Section 4.4.2 of the FMP addresses the issue of public safety, and subsection (F) ‘outline[s] mitigation actions required to protect values at risk and to ensure the safety of park staff and visitors as well as the neighboring public.’ [Id. at 54-55 (emphasis added)]. Table 13, titled ‘Mitigations for Public Safety Issues,’ then addresses various actions to be taken to protect various groups and resources. [Id. at 55]. *** Plaintiffs have cited mandatory directives to support jurisdiction over their claims based on the failure to warn about the Chimney Tops 2 fire, the Court finds that it has jurisdiction over this matter, and Defendant’s motion to dismiss for lack of jurisdiction … will be denied.

https://www.nationalparkstraveler.org/sites/default/files/attachments/reed-chimney_tops_2_lawsuit.pdf

Legal Lessons Learned: “Failure to warn” establishes a cause of action under Federal Tort Claims Act. See also the After Action Report (Dec. 19, 2017): “An After Action Review has been released for the Chimney Tops 2 Fire that spread from Great Smoky Mountains National Park into the city of Gatlinburg, Tennessee a little over a year ago killing 14 people, forcing 14,000 to evacuate, destroying or damaging 2,500 structures, and burning 17,000 acres. The AAR, completed by ABS Group, was commissioned by Gatlinburg and Sevier County.”

4-5
IN: DRONE – WOMAN FINDS DRONE IN HER YARD – ONBOARD VIDEO SHOWS NEIGHBOR CARRYING DRUGS [also filed, Chap. 1]

On Oct. 24, 2019, in Galen Byers v. State of Indiana, Court of Appeals of Indiana held (3 to 0) that the search warrant was obtained timely, and the trial court properly denied the defendant’s motion to suppress. Criminal case for dealing methamphetamine will now be tried, unless the defendant enters a guilty plea.

“Moreover, while we look at the date of the video footage to determine whether probable cause existed, some lapse can also be accounted for here because [Marcie] Vormohr was in possession of the drone for likely at least one of those days. And, although we acknowledge that the woman in the video handled the alleged substances, the video also shows another individual—a man who Vormohr testified was Byers—handling the drone moments later in the same and subsequent video recordings. Based on the facts and circumstances before us, we cannot say that a four-day period between the activity and the finding of probable cause renders the warrant constitutionally stale.”

https://www.in.gov/judiciary/opinions/pdf/10241902eft.pdf

Legal Lessons Learned: If you are a drug dealer, be cautious of drones with video cameras.

4-4

NY: RE-KINDLE WAREHOUSE FIRE – FD HAD TURNED OFF SPRINKLER SYSTEM – NO GOVERNMENTAL IMMUNITY

On Oct. 23, 2019, in Zurick American Insurance Company v. City of New York, the Supreme Court of New York, Appellate Division / Second Judicial Department held (5 to 0) that the insurance company for the warehouse may proceed with the lawsuit against the City of New York.

“Here, the plaintiffs' allegations that FDNY personnel, upon arriving at the scene and assuming control over the ongoing fire, shut off the main water supply valve to the warehouse's sprinkler systems, then certified to warehouse employees that it was safe to reenter the building when in fact the fire was still at risk of rekindling—which it did within minutes after FDNY personnel left the premises—are sufficient to establish a special relationship (see Trimble v City of Albany, 144 AD3d 1484; S.C. Freidfertig Bldrs. v Spano Plumbing & Heating, Inc., 173 AD2d 454). Therefore, we agree with the Supreme Court's determination denying the defendant's motion to dismiss the complaint.”


Legal Lessons Learned: Extreme care must be exercised when a sprinkler system is shut down.

4-3
CA: WILDLAND FIRE IN NATIONAL FOREST – WATER TRUCK RAN OVER FF SLEEPING AT BASE CAMP – NO AUTOMATIC GOVT IMMUNITY

On July 15, 2019, in Rebecca Megan Quigley v. Garden Valley Fire Protection District, et al., the Supreme Court of California held (7 to 0), the Court reversed the Court of Appeals which had held that the base camp management team and their Fire Departments were automatically protected from liability by CA governmental immunity statute.

“If the Court of Appeal determines that section 850.4 immunity was not adequately raised in defendants’ answer, the case should be remanded to permit the trial court to decide whether to exercise its discretion to allow the belated assertion of the defense after the commencement of the trial.”

Legal Lessons Learned: The injured Federal firefighter was covered by workers comp, but under CA broad governmental immunity statute, she will have a difficult time obtaining damages from these California commanders or their fire department.

Note: “Government Code section 850.4(section 850.4), the provision at issue in this case, establishes immunity: ‘Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or,’ with the exception of certain motor vehicle accidents, ‘for any injury caused in fighting fires.’ Section 850.4 was enacted at the recommendation of the Law Revision Commission. The commission’s report to the Legislature explained section 850.4’s purpose as follows: ‘There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and firemen should not be deterred from any action they may desire to take in combating fires by a fear that liability might be imposed if a jury believes such action to be unreasonable.’”

4-2

GA: DRONE VIDEO ADMISSIBLE - SHOWS ARREST DURING DEMONSTRATION WAS LAWFUL


“The video footage shows Plaintiff step off the sidewalk in one location, walk around a group of people watching and filming the fight, and step back onto the sidewalk — directly into the area where Defendant stood protecting the officers making arrests. (Id. at minute mark 3:58.) Contrary to Plaintiff’s allegations, he was not standing still at the time of his arrest. He was moving toward the area Defendant was trying to secure.”

Legal Lessons Learned: Videos can sometimes lead to dismissal of lawsuit.
OH: MJ FOUND IN HOUSE FIRE – DRUG DETECTIVE NEEDED WARRANT –
SCENE WAS SAFE
On Aug. 24, 2018, in State of Ohio v. Albert N. Smith, the Court of Appeals for Fifth Appellate District (Licking County) held (3 to 0) that the trial court judge properly granted defendant’s motion to suppress the marijuana and other evidence.

“Det. Thomas testified that he was assured the fire was out, and the home was safe for him to enter …. Det. Thomas also stated that he was not told that any of the evidence was in danger of being damaged by smoke, water or fire. Based on the foregoing, we do not find exigent circumstances existed that required or allowed for a warrantless search of the premises. We therefore find no error in the trial court’s suppression of the evidence collected in this matter.”

Legal Lessons Learned: If the structure fire has been extinguished, and the property deemed safe to enter, FD should continue to secure the property, while PD gets a search warrant.

Chap. 5  Emergency Vehicle Operations

5-19

MI: NON-EMERGENCY TRANSPORT – BLACK ICE, AMBULANCE ROLLED OVER DITCH – NO IMMUNITY, NON-EMERGENCY

On Nov. 24, 2020, in Charles C. Willis v. Community Emergency Medical Service, Inc. and Eric J. Norris, the State of Michigan Court of Appeals, held (3 to 0; unpublished decision) that lawsuit against the ambulance company and the EMT driver is reinstated, overturning trial judge’s decision that there were no material facts showing negligence. The Court of Appeals found that there is a dispute whether EMT was driving too fast for weather conditions, with ice on the ground and a mix of rain, snow, and sleet; Court also held the immunity statute for EMS does not apply to non-emergency transports.

“[W]e conclude that the trial court erred in granting defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10). Specifically, the trial court erred by failing to view the evidence in the light most favorable to plaintiff and to draw all reasonable inferences in his favor, and by weighing credibility. Plaintiff may not be able to establish his claim for negligence ultimately, but he has at least raised a genuine issue of material fact regarding whether the accident at issue occurred because Norris was negligent by driving too fast for the weather conditions. Accordingly, we reverse that portion of the trial court’s order granting defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10).”


Legal Lesson Learned: The state’s immunity statute protects EMS only for “treatment” of a patient.

5-18

TX: AMBULANCE LEFT RUNNING AT SCENE – STOLEN, INJURED MOTORISTS – ANTI-THEFT DEVICE NOT REQUIRED – NO CASE

On Nov. 25, 2020, in The City of San Antonio v. Suzanne L. Smith and Claudia Acevedo, the Fourth Court of Appeals, San Antonio held (3 to 0) that the trial court should have dismissed the lawsuit against the City; while an anti-theft device may be helpful when leaving an ambulance running at 3 am, the City enjoys government immunity. The plaintiffs had included an affidavit from Robyn McKinley, a firefighter and paramedic in Memphis, Tennessee, who specifically advocated for the use of an anti-theft device manufactured by a company called Tremco. This device apparently is designed to make it difficult to put a vehicle into gear even though the vehicle has been left running.”
“In the present case, Appellees allege that the ambulance was not equipped with a specific anti-theft device that may have prevented it from being stolen even though it was left running. They argue that the City thus used or provided property (the ambulance) that lacked an integral safety feature (a particular anti-theft device), thus bringing their claims within the "use or condition of personal property" waiver pursuant to Lowe and Robinson. The City counters that Appellees' claims do not fall within that waiver because the ambulance was equipped with anti-theft devices—door locks and an alarm—and Appellees' contention that it should also have been equipped with a different device is not cognizable under the integral safety component theory. See Bishop, 156 S.W.3d at 584 (theory applies "only when an integral safety component is entirely lacking rather than merely inadequate"). We agree with the City.

***

[Footnote 3.] Insofar as Appellees challenge the City's decision not to equip its ambulances with the particular anti-theft device they favor, which they contend is a safety feature, we note that ‘decisions about installing safety features are discretionary decisions for which the [City] may not be sued.’ Tex. Dep’t of Transp. v. Ramirez, 74 S.W.3d 864, 867 (Tex. 2002).” https://law.justia.com/cases/texas/fourth-court-of-appeals/2020/04-20-00077-cv.html

Legal Lesson Learned: Theft of ambulances left running at the scene are increasingly common; if possible, lock the doors and take a second set of keys.

Note: Plaintiff’s expert suggested Tremco anti-theft device. See their ad: https://www.tremcopoliceproducts.com/

- Vehicles Can Be Left Unattended While Running
- Allows Emergency Lighting & Other Electronics to Operate
- Provides More Security at The Scene Of An Accident
- Inexpensive & Easy to Install – Plug N Play.

5-17

NY: VOL. FF IN MVA – CROSSED AGAINST RED LIGHT- NO SIREN, ONLY EMER. LIGHT - 40% LIABLE – JURY $20,000

On Aug. 19, 2020, in Jeffrey K. Schleger v. Michael F. Jurcsak, the Supreme Court of the State of New York, Appellate Division (Second Judicial Department) upheld (3 to 0) the jury’s verdict, finding plaintiff 60% liable and only awarding him $20,000 in damages.

“Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence,' and its credibility determination is entitled to deference" (id., quoting Aronov v Kanarek, 166 AD3d 574, 575 [internal quotation marks omitted]). Contrary to the plaintiff's contention, the jury's verdict on the issue of liability finding that the plaintiff was negligent and 60% at fault in the happening of the accident was not contrary to the weight of the evidence because a fair interpretation of the evidence supports the verdict (see
Legal Lessons Learned: Fire Departments should require fire & EMS personnel to use both emergency lights and sirens when entering intersection against a red light. Volunteers should inform their personal insurance companies in writing they are using their personal vehicles to respond and request written confirmation they have coverage.

5-16

NY: FDNY AMBULANCE RESPONDED TO MVA – BACKED INTO VEHICE – CLAIM NOT FILED WITHIN 90 DAYS

On July 15, 2020, in case In the Matter of Johanny M. Lugo et al. v. City of New York, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, upheld (5 to 0) the trial court judge’s decision dismissing her request to file a late claim. Court wrote: “Here, the police accident report stated that the EMS vehicle caused “no damage” to the petitioner’s vehicle, and did not indicate that there was any connection between the petitioner’s alleged injuries and any negligent conduct on the part of the operator of the EMS vehicle. Thus, the petitioner failed to establish that the police accident report provided actual notice of the facts constituting the petitioner’s claim that she sustained serious injuries as a result of the City’s negligence….”

Legal Lesson Learned: Courts will enforce municipal ordinances requiring timely, written notice of a tort claim.

5-15 [Also filed, Chap. 13]

IL: PRIVATE AMBULANCE – RAN RED LIGHT WHEN DRIVING TO NON-EMERGENCY TRANSPORT - NO IMMUNITY

On June 18, 2020, in Roberto Hernandez v. Lifeline Ambulance, LLC, et al., the Supreme Court of State of Illinois, held (4 to 3) that the private ambulance driver and his employer are not protected under the state’s EMS immunity statute when the ambulance driver, on a non-emergency run without lights or siren, ran a red light and injured the driver of another vehicle. The ambulance had been dispatched to pick up a patient for nonemergency medical
transport from Symphony at Aria Post Acute Care in Hillside to Villa Park Home Dialysis in Villa Park. The Court’s major held: “The issue presented is whether section 3.150 of the Emergency Medical Services Systems Act (EMS Act) (210 ILCS 50/3.150 (West 2016)) provides immunity from liability—to an ambulance owner and its driver—stemming from a motor-vehicle accident caused by the negligent operation of the ambulance while en route to pick up a patient for nonemergency transportation. We answer this question in the negative, holding that defendants are not immune from liability under the circumstances of this case.”


Legal Lessons Learned: EMS driving running a red light for a non-emergency transport should be held responsible, along with his company, for his negligent conduct.

Note: Three dissenting Justices disagreed:

“In the case at bar, at the time of the accident, Nicholas was rendering nonemergency medical services in the normal course of conducting his duties. Nicholas was in the process of responding to a dispatch to transport a patient to a health care facility. Driving to the patient was preparatory for and integral to delivering the medical service. Further, the accident occurred before transporting the patient to a health care facility and during defendant’s driving in response to the dispatch. Therefore, absent willful and wanton misconduct, section 3.150(a) of the EMS Act immunizes defendants for their alleged negligent acts or omissions while providing nonemergency medical services.”

5-14

AL: PARAMEDIC INJURED IN MVA - SETTLED WITH DRIVER $25K, BUT WITHOUT CONSENT OF MEDIC’S INSURANCE CO. – STATE FARM NO LONGER REQ. COVER “UNDERINSURED”

On May 29, 2020, in David R. Turner v. State Farm Mutual Insurance Company, the Supreme Court of Alabama, upheld the trial court’s dismissal of the paramedic’s lawsuit against his own insurance company [All State].
https://acis.alabama.gov/displaydocs.cfm?no=1022968&event=5S20LJXMT

Legal Lessons Learned: If injured in MVA, do not settle and release the other driver’s insurance company without the consent of your insurance company. Since medic also covered by worker’s comp, the state fund has a right to recover from the $25K settlement.

5-13

TX: FIRETRUCK ACCIDENT AT INTERSECTION– FF DIDN’T STOP RED LIGHT / FD POLICY – NOT RECKLESS – GOVT IMMUNITY

On May 28, 2020, in The City of Kingsville v. Ermelinda Dominguez, the Court of Appeals, Thirteenth District of Texas (Corpus Christi – Edinburg), reversed the trial court and ordered the lawsuit dismissed since the firefighter was not driving recklessly, when on an EMS run with lights and siren, he followed an ambulance through a red light at reasonable speed. The Court wrote: “[T]he fact that Mendiola violated department policy by not coming to a
complete stop prior to entering the intersection is not evidence of recklessness. See Hudson, 179 S.W.3d at 700–01; see also City of Laredo v. Varela, No. 04-10-00619-CV, 2011 WL 1852439, *3–5 (Tex. App.—San Antonio May 11, 2011, no pet.) (mem. op.) (holding that an officer’s failure to adhere to policy requiring emergency vehicles to come to complete stop did not raise fact issue as to whether officer acted with reckless disregard for the safety of others). We conclude that the undisputed facts do not demonstrate that Mendiola committed an act that he knew or should have known posed a high degree of risk of serious injury but did not care about the result. See Perez, 511 S.W.3d at 236. Rather, by travelling at a speed below the speed limit, activating his siren and emergency lights and confirming that the cross-traffic was yielding, Mendiola was not acting with reckless disregard to others. Because the jurisdictional record fails to raise a fact issue regarding recklessness, the City retains its immunity from suit pursuant to the TTCA’s [Texas Tort Claims Act] emergency response exception.”


Legal Lessons Learned: FDs should consider including in their emergency vehicle policy those situations where one apparatus is following another through a controlled intersection.

5-12

**TX: MEMBER OF COMMUNITY. EMER. RESPONSE TEAM [CERT] - ILLEGALLY USING LIGHTS & SIREN – CONVICTION CONFIRMED**

On April 14, 2020, in Michael Thomas Paul v. State of Texas, the Court of Appeals, Seventh District of Texas at Amarillo, held (3 to 0) that defendant was properly convicted after a bench trial (not jury trial) of the offense of impersonating a public servant, a third-degree felony. https://cases.justia.com/texas/seventh-court-of-appeals/2020-07-19-00027-cr.pdf?ts=1586952945

Legal Lessons Learned: Members of CERT Teams should be reminded they are not emergency responders, and use of emergency lights & sirens can lead to conviction.

Note: Defendant was very fortunate to receive a suspended sentence and placed on probation for three years.

5-11

**LA: ENGINE EMER. RUN – FROM LEFT LANE, MADE SHARP RIGHT TURN, COLLISION – GROSS NEGLIGENCE - NO IMMUNITY**

On Jan. 8, 2020, in Louis Ridgel v. Mitchell Chevalier, St. Bernard Parish Fire Department, et al., the LA Court of Appeals, Fourth Circuit, held (3 to 0) that the trial judge properly found that the firefighter’s sharp right turn, even if had lights and sirens on, amounted to “gross negligence” and therefore the states’ immunity statute did not apply.

“The trial court found, however, that Mr. Chevalier [FF driver] should have kept a proper lookout for other motorists on the road, specifically because he was making a right turn from the left lane. Further, the trial court determined that the evidence showed that Mr. Chevalier intended to make a quick right turn from the left lane onto West Judge Perez Drive, but did not ensure it was safe to make that right turn. As such, the trial

Legal Lessons Learned: Share these facts with your FD and discuss what steps could have been taken by both the FF driver and the Captain to avoid the collision. FYI: the plaintiff claimed personal injury and was awarded total of $143,074 in damages.

5-10

TX: PD RESPONSE ROBBERY CALL – MVA – CONFLICTING REPORTS ON EMERGENCY LIGHTS, LAWSUIT REINSTATED

On Oct. 29, 2019, in Marcia Gomez v. City of Houston, the Texas Fourteenth Court of Appeals held (en banc decision of all judges on court, vote of 6 to 3) held that the trial court improperly granted immunity to the City.

“Thus, the City’s evidence of good faith assumes the truth of a disputed fact—that [Officer] Simmons was using his overhead emergency lights as he approached the Crosstimbers intersection. Simmons testified that he used overhead emergency lights continuously from the beginning of his response to the armed-robbery call, but the record contains other evidence that he did not do so. This evidence includes (1) [plaintiff] Gomez’s affidavit testimony that Simmons was not using his vehicle’s overhead emergency lights and (2) [Houston PD Accident Investigator Isaac] Jefferson’s PD accident determination in his investigation report that Simmons was not using his vehicle’s overhead emergency lights before the collision.”

***

The City did not conclusively establish Simmons’s good faith, and a material fact issue exists as to whether Simmons acted recklessly. Therefore, we reverse the trial court’s judgment and remand the case to the trial court for further proceeding consistent with this opinion.


Legal Lessons Learned: Emergency response when lights & siren not used, extreme care must be exercised to prove you drove with “due regard” for the safety of others. For example, Ohio Revised Code 4511.03, Emergency Vehicles At Red Signal Or Stop Sign, provides: “(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.” http://codes.ohio.gov/orc/4511.03v1
NY: VOL. FF INJURED ENGINE ROLLED OVER – CAN NOT SUED VOL. DRIVER OR FD - NO PROOF WILLFUL NEGLIGENCE


“After long thought and careful analysis, the Court grants both defendants motions for judgment dismissing the complaint and denying plaintiff’s motion to amend the same. First, the Court finds, as a matter of law, upon the papers submitted, that plaintiff fails to demonstrate a triable issue whether the conduct of Kyle Verstraete constituted willful negligence or malfeasance.” [https://law.justia.com/cases/new-york/other-courts/2019/2019-ny-slip-op-29270.html]

Legal Lessons Learned: The injured volunteer firefighter’s only remedy is workers comp. Other lesson - wear your seat belt.

IL: PATIENT INJURED AMBULANCE CRASH - 65 MPH WET HWY – PARAMEDIC REPRIMANDED - QUALIFIED IMMUNITY

On Aug. 6, 2019, in Jeremy Hicks and Isaiah Sampson (a minor) v. City of Fallon, et al., 2019 Ill. App. 5th 180397, the Appellate Court of Illinois, Fifth District, held (3 to 0) that the trial court properly granted summary judgment to the City and the EMS personnel. Justice Barberis wrote:

“[P]laintiffs argue that Sill's [paramedic] failure to operate the ambulance at a speed below the speed limit violated the City's policies and procedures, per Wild's deposition testimony, that required an ambulance to be operated slower in adverse conditions than it might be otherwise be operated in nonadverse conditions. First, we note that Wild [paramedic] testified that drivers were to maintain slower speeds during adverse weather conditions, although he was unsure whether a specific policy was in place. Moreover, our colleagues in the First District stated that a ‘[v]iolation of self-imposed rules or internal guidelines *** 'does not normally impose a legal duty, let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.' Wade v. City of Chicago, 364 Ill. App. 3d 773, 781 (2006) (quoting Morton v. City of Chicago, 286 Ill. App. 3d 444, 454 (1997)). Thus, a violation of the City's policy, if one had existed at the time of the accident, would not alone constitute evidence of willful and wanton conduct.” [https://casetext.com/case/hicks-v-city-of-ofallon]

Legal Lessons Learned: Immunity statute very helpful; but use caution when driving high speeds on a wet highway.
TX:  EMT LOST CONTROL AMBULANCE - INJURED ROAD GRADER – MAX LIAB. OF NOT-FOR-PROFIT CO. IS $100K

On May 23, 2019, in Jose Roel Garcia v. Jesse Perez and South Texas Emergency Care Foundation, Inc., the Court of Appeals of Thirteenth District, Corpus Christi held (3 to 0)

“Thus, we conclude that García’s argument that STEC is not an emergency service organization because it is not operated by volunteer members is not supported by the statute. Accordingly, we reject this argument.”

Legal Lessons Learned:  Helpful to have a statutory cap on liability for volunteer and not-for-profit emergency response organizations. This may also reduce the cost of insurance.

LA:  EMER. LIGHTS USED, BUT NO SIREN – CHILD NON-BREATHER RUN - NO STATUTORY IMMUNITY

On Feb. 22, 2019, in Nunzio Inzina & Emily Inzina v. Troy Guitreau, et al., the State of Louisiana, Court of Appeal, First District (3 to 0) held that “because the trial court's finding that Mr. Guitreau's emergency lights were insufficient to warn motorists of his approach was not manifestly erroneous, the trial court properly determined that the ‘reckless disregard’ (or ‘gross negligence’) standard does not apply. Mr. Guitreau does not meet the requirements of 32:24(C) and therefore his actions must be assessed under an ordinary negligence standard.”


Legal Lessons Learned: If you are in an accident responding to an emergency, and your siren was on, keep it on when calling dispatch to report the accident – the 911 Dispatch recording will help avoid litigation and liability.

IL:  STATE IMMUNITY STATUTE PROTECTS PRIV. & PUBLIC AMBULANCES – ONLY IF PATIENT ON BOARD

On Feb. 1, 2019, in Roberto Hernandez v. Lifeline Ambulance, LLC and Joshua M. Nicholas, the Appellate Court of Illinois (First District; Fifth Division) held (2 to 1):
“As the ambulance driven by Nicholas was not transporting a patient to a health care facility at the time of the collision with the vehicle driven by the plaintiff, section 3.150(a) of the EMS Act does not provide Nicholas or Lifeline with immunity from liability for any negligent acts or omissions which proximately resulted in damages to the plaintiff. https://cases.justia.com/illinois/court-of-appeals-first-appellate-district/2019-1-18-0696.pdf?ts=1549320383

Legal Lessons Learned: The Illinois immunity statute broadly includes non-emergency transports, but not so broad as to cover driving ambulance to pick up a patient. Hopefully the ambulance company’s private insurance will cover both the company and its employee.

5-4

OH: MAN KILLED BY LOOSE FIRE HOSE – NO WILLFUL OR WANTON MISCONDUCT / NFPA GUIDELINES

On Jan. 18, 2019 in Linda H. Ogburn, etc., Appellant, v. City of Toledo, Appellee., Court of Appeals of Ohio, Sixth District, Lucas County:

“The evidence contained in the record by way of deposition testimony reveals that the city removed the safety nets on its fire engines to facilitate firefighter safety, based upon incidents in which TFRD firefighters were tripped by the nets when they were attempting to utilize fire hoses. According to TFRD's fire maintenance officer, the nets also slowed down firefighting efforts that are time-sensitive in nature. As a result, TFRD decided to remove the safety nets and install holsters in their place. The holsters that were installed eliminated the trip hazard presented by the nets, while at the same time facilitating expedient use of the fire hoses. Since the nets were removed and the holsters installed, the city has safely completed over one million runs without a fire hose coming loose from a fire engine. To us, the fact that over one million runs have taken place without incident demonstrates that injury to others does not ordinarily follow from the removal of safety nets and installation of the holsters.”

https://scholar.google.com/scholar_case?case=11320550123465325906&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Legal Lessons Learned: Secure your fire hoses; avoid similar tragedies.


Note: Ohio public employees are protected by indemnification statute they acted in “good faith.” Ohio Revised Code 2744.07: “The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of
employment or official responsibilities. *** Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.” [http://codes.ohio.gov/orc/2744.07](http://codes.ohio.gov/orc/2744.07)

Likewise, “reckless” driving by fire or EMS can lead to personal liability if case is not settled by the political subdivision. In Anderson v. Massillon, involving aerial truck killing elderly driver and his grandson, the Ohio Supreme Court in 2012 held that the aerial driver and the Captain were not entitled to immunity, but the City was immune. See video from scene: [https://www.youtube.com/watch?v=ga_vHeGYQ34](https://www.youtube.com/watch?v=ga_vHeGYQ34)

The Supreme Court held: “R.C. 2744.02(B)(1)(b) provides a political subdivision with a full defense to liability for injuries caused by the operation of a fire department vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm if its operation does not constitute willful or wanton misconduct. R.C. 2744.03(A)(6)(b) provides immunity to employees of a political subdivision for acts that are not committed in a wanton or reckless manner.” [http://www.legallyspeakingohio.com/wordpress/wp-content/uploads/2013/03/anderson-v-massilon.pdf](http://www.legallyspeakingohio.com/wordpress/wp-content/uploads/2013/03/anderson-v-massilon.pdf)


5-3

**CA: DRUNK DRIVER RAN INTO FIRE ENGINE – MUST PAY FULL RESTITUTION, EVEN IF FD INSURED**

On Jan. 15, 2019, in *The People v. Christian A. Zuniga*, the Court of Appeal of California, First Appellate District, held 3 to 0 [unpublished opinion],

“We have carefully reviewed the entire record in accordance with our *Wende* obligations, and we conclude there are no arguable issues on appeal that require further briefing. (See *People v. Birkett* (1999) 21 Cal.4th 226, 245-247 [victim entitled to restitution in the ‘full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses’].)” [http://www.courts.ca.gov/opinions/nonpub/A154587.PDF](http://www.courts.ca.gov/opinions/nonpub/A154587.PDF)

Legal Lessons Learned: Great lesson for this drunk driver. The Insurance company may be entitled to a refund, if this defendant ultimately pays full amount.

5-2
OH: EMER. VEH. OPERATOR ENTITLED TO IMMUNITY – BACKED OVER WALKER – NOT “RECKLESS”

On Oct. 9, 2018, in Riehm v. Green Springs Rural Volunteer Fire Dept., 2018-Ohio-4075, the Ohio Court of Appeals for Third District (Seneca County), held (2 to 1) that the trial court improperly denied the fire department, and firefighter Seth T. Knieriemen’s motions for summary judgment.

“As to Knieriemen individually, he could still be liable if his conduct constituted recklessness. Recklessness implies conduct that is substantially greater than negligence. Knieriemen’s failure to follow standard operating guidelines does not establish a genuine issue of material fact as to whether there was more than negligence here, particularly where he did not see, and perhaps could not have seen, Lorri. Knieriemen’s conduct could certainly be considered negligent, but not substantially greater than negligent. Therefore, we find that the trial court also erred on this issue.”


Legal Lessons Learned: Tragic accidents can be avoided if SOGs are followed, including using a backer.

5-1

MI: AMBULANCE STRUCT DEBRIS IN ROADWAY, EMT INJURED – NOT ENTITLED TO UNINSURED MOTORIST INSURANCE COVERAGE

On Feb. 27, 2018, in Jeremy Drouillard v. American Alternative Insurance Company, the Court of Appeals of Michigan held (2 to 1) that the insurance policy which was purchased by ambulance company does not cover such an accident.

“[T]he plain language of the contract provides uninsured motorist coverage to Drouillard [EMT passenger] only if the unidentified pickup truck caused an object to hit the insured ambulance, and not vice versa. Reviewing the pertinent section as a whole, the language cannot reasonably be understood in any other way. Importantly, Drouillard and Schoenberg [EMT driver] both admitted that the building materials were stationary at the time of the accident, and Schoenberg agreed that, as the driver of the ambulance, she struck the materials in the roadway. Therefore, this is not a situation in which a hit-and-run vehicle caused an object to hit the insured ambulance, and Drouillard is not entitled to uninsured motorist benefits under the terms of the policy.”


Legal Lessons Learned: Ask your insurance carrier how they would respond to a similar claim; if they would deny the claim, then get the insurance carrier to amend your policy or find a new carrier.
Chap. 6  Employment Litigation, including Workers’ Comp.

6-57

MO: MANDATORY AGE 65 RETIREMENT – CITY POLICE DEPT - LAWFUL UNDER FEDERAL ADEA FOR POLICE / FIRE

On Nov. 16, 2020, in Michael Caruso v. St. Louis, Missouri, U.S. Magistrate Judge Shirley P. Mensah, U.S. District Court, Eastern District of Missouri (Eastern Division), granted the City’s motion to dismiss; the City has a mandatory age 65 for its police officers, and while occasionally they will grant a one-year extension, there is no requirement to do so. This is authorized under the federal ADEA, Age Discrimination in Employment Act amendments in 1986; see also EEOC guidance: https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967

“Defendant concedes Plaintiff was terminated because of his age but argues Plaintiff's discharge fell within an exemption in the ADEA that allows state and local governments to set a mandatory retirement age for police officers provided certain requirements are met. Specifically, under 29 U.S.C.§ 623(j), state and local governments are allowed to set mandatory retirement ages for firefighters and law enforcement officers if the following two requirements are met: First, the discharge must have been pursuant to a state or local law requiring mandatory retirement by a certain age; and, second, the discharge must be pursuant to a bona fide retirement plan that is not a subterfuge for impermissible age discrimination. 29 U.S.C. § 623(j)(1)-(2). To satisfy the first requirement, the mandatory retirement law must either have been in effect on March 3, 1983 or must have been enacted after September 30, 1996; and, if the latter, the discharge must occur no earlier than age fifty-five. See Correa-Ruiz v. Fortuno, 572 F.3d 1, 9 (1st Cir. 2009) (construing 29 U.S.C. §623(j)(1)(A) and (B)(ii) to mean the discharge must have been ‘pursuant to a mandatory retirement plan that either was in effect on March 3, 1983 or was enacted after September 30, 1996. The only-age related limitation on the latter option is that the discharge occurs no earlier than age fifty-five.’).

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZjoMXHbjadZDEq7kSjk%2BwtWPLJ9YZvcRPzxEY1orv6v

Legal Lesson Learned: Federal ADEA statute, amended 1986, authorizes mandatory retirement ages for police and fire.

Note: See Congressional testimony, March 12, 1986, on the proposed exemptions to the ADEA for police and fire. “Air traffic controllers, for instance, must retire at age 56, foreign service officers at age 65, and Federal firefighters and law enforcement officers, including employees of the FBI, Secret Service, and Federal Prison System, must retire at the age of 55.

https://www.ncjrs.gov/pdffiles1/Digitization/103277NCJRS.pdf
**NJ: PENSION SURVIVOR BENEFITS – ONLY IF FEMALE WAS MARRIED TO MALE FF OR “SAME SEX DOMESTIC PARTNER”**

On Nov. 5, 2020, in *The Matter Of Board Of Trustees Of The Police And Firemen’s Retirement System Of New Jersey – Denial Of Dolores Ortega’s Right To Receive Survivor Benefits*, the Superior Court of New Jersey Appellate Division, held (3 to 0; unpublished decision) that Ms. Ortega did not qualify for survivor benefits because she was not the member’s widow.

“Contrary to appellant’s contention, the statutory and regulatory scheme did not discriminate against her on the basis of her gender. Because she and Koncsol were of opposite sexes, they were free to marry, which would have enabled her to qualify for the survivor benefit. On the other hand, same-sex couples could not marry when the Act went into effect and, therefore, the Legislature wanted to provide a mechanism limited to them in the Act to ensure that these individuals would have the same right to this benefit as an opposite-sex couple. Thus, there was ‘a clear and rational basis’ underlying the Legislature's decision to ‘mak[e] certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex . . . ’ N.J.S.A. 26:8A-2(e).”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZvIVF%2BSpwi61gSoehD%2F89NWJSNvj394DBr50iS5GXrLH

Legal Lesson Learned: It would have been helpful if the state retirement Board had promptly notified the firefighter, when he submitted his change of beneficiary, that he had to marry Dolores Ortega.

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**DE: WHISTLEBLOWER CASE DISMISSED – FIRE CHIEF CONVICTED, TO PRISON, BUT MONEY STOLEN NOT CITY FUNDS**

On Oct. 29, 2020, in *Thomas Hayman, Jr. v. City of Willington, et al.*, U.S. District Court Judge Vivian L. Medinilla granted the City’s motion to dismiss federal Whistleblower lawsuit for his termination for alleged retaliation, since the theft of money by the Fire Chief was not from the City. The money was from “Gallant Blazers Organization,” where Fire Chief was President of this professional development group that helped minority firefighters in Wilmington. See April 26, 2019 article: “Former Wilmington fire Chief Anthony Goode gets prison time for theft.”


“Accordingly, to state a claim under the Whistleblower Protection Act, Plaintiff must show that any alleged retaliation was for reporting: (1) a violation of financial management or accounting standards; (2) that the violation was related to funds or assets under the control of his employer; and (3) that the violation was due to an act or omission of his employer or an agent thereof. Plaintiff fails to satisfy prongs two and three.
Following an investigation, public records reflect that the DOJ brought criminal charges including criminal racketeering and theft against Goode, who subsequently pled guilty to theft of $50,000 or more and unlawful use of a payment card. In 2019, he was sentenced to one year in prison followed by a period of probation and repay the Gallant Blazers more than $62,000.” [Footnote 3.]
https://casetext.com/case/hayman-v-city-of-wilmington

Legal Lesson Learned: It is unfortunate that the firefighter did not retain legal counsel.

Note: If there were any federal funds involved in the theft, plaintiff could have filed a civil whistleblower claim under seal, and then U.S. Attorney’s Office in Delaware and FBI could help pursue his civil action. “In FY2019, qui tam whistleblowers received $272 million in rewards.” Department of Justice Report Shows Whistleblowers Consistently Rewarded through Qui Tam Lawsuits. https://www.natlawreview.com/article/department-justice-report-shows-whistleblowers-consistently-rewarded-through-qui-tam

The State of Delaware also has a whistleblower protection statute. It provides, in part:

“A court, in rendering a judgment in an action brought under this chapter, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, expungement of records relating to the disciplinary action or discharge, actual damages, or any combination of these remedies. A court may also award, as part of a judgment in an action brought under this chapter, all or a portion of the costs of litigation, including attorneys’ fees, if the court determines that such an award is appropriate.”
https://delcode.delaware.gov/title19/c017/index.shtml

6-54

MI: DEPUTY SHERIFF REPORTED MISUSE DRUG FORFEITURE FUNDS – 1st AMEND. ONLY IF SPEAKING AS “PRIVATE CITIZEN”

On Oct. 9, 2020, in Garrett DeWyse v. William L. Federspiel, Heather Beyerlein, and County of Saginaw, et al., the U.S. Court of Appeals for 6th Circuit (Cincinnati), held (3 to 0; unreported decision) the trial court judge properly dismissed the First Amendment retaliation lawsuit by Deputy who reported to County Finance Director possible misuse of drug forfeiture funds. The Deputy was in charge of Property & Evidence Room and was reporting on an item related to his official duties; he was not “speaking” as a private citizen reporting on an item of great public concern.

“In reaching this outcome, we do not question DeWyse’s motivation, nor do we condone disciplining public employees for raising concerns about government mismanagement or corruption. See Mayhew, 859 F.3d at
Legal Lesson Learned: If the Deputy Sheriff had gone to his union, County Prosecutor, FBI or County Commissioners, then his “speech” may have been protected.

Note: The 6th Circuit judges in this case described a recent decision where public employee was protected by 1st Amendment.

“Our recent decision, Mertins v. City of Mount Clemens, 817 F. App’x 126 (6th Cir. 2020), does not counsel otherwise. There, a city finance department employee discovered the city was overbilling residents for utilities….Yet when the employee raised the issue with her supervisors, she was subjected to reprimands and harassment… The employee then raised these same concerns with her union, local prosecutors, the FBI, and city commissioners. Id. At the same time, she continued to face discipline from her supervisors. Id. The employee eventually filed a First Amendment retaliation claim against her supervisors, and we later reversed the district court’s grant of summary judgment for the defendants.” [June 5, 2020 decision of 6th Circuit: https://law.justia.com/cases/federal/appellate-courts/ca6/19-1416/19-1416-2020-06-05.html]

Many states have enacted whistleblower protection statutes. For example: Ohio Revised Code 4113.52, "Reporting violation of law by employer or fellow employee."

“(1) (a) If an employee becomes aware in the course of the employee’s employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee’s employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee’s supervisor or other responsible officer of the employee’s employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within the inspector general’s jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.” http://codes.ohio.gov/orc/4113.52

See also other Ohio statutes:

“Ohio has a general whistleblower protection statute that protects whistleblowers who report suspected felonies, crimes that may cause physical harm, and crimes that may produce a hazard to the public health or safety. Also, several other Ohio statutes contain anti-retaliation provisions. Employees who engage in protected activities under laws in the following subject areas are protected from retaliation: abuse or neglect of residents at health-care facility, discrimination, minimum wage,
NJ: RECRUIT FIRED AFTER GRADUATION – PRIOR TO ACADEMY HAD ALTERED INSURANCE CARD TO SHOW ADDRESS IN CITY - REINSTATED

On Oct. 19, 2020, In The Matter of Christopher D’Amico, City of Plainfield, Fire Department, the Superior Court of New Jersey, Appellate Division, held (2 to 0) in unpublished decision, that the New Jersey Civil Service Commission, based on the findings of their Administrative Law Judge, properly ordered the City to rehire the firefighter, with back and seniority rights. The Fire Chief also supported the re-hire decision.

“After reviewing the City's exceptions, the Commission agreed with the ALJ. It held D'Amico provided his true address on the card and the addition of correct information on the document did not indicate a lack of character or morals to be a firefighter. Even if it were, the Commission concluded the City was aware of the altered document in May 2017, before D'Amico was hired and attended the fire academy. In addition, because D'Amico was on the job for only three or four hours at the time he was terminated, the Commission concluded the City had the burden of proving D'Amico was guilty of the charges. Based on its findings, the Commission reinstated D'Amico, and awarded him back pay, benefits, and seniority status.”

Legal Lesson Learned: Civil Service Commissions can perform valuable service; Courts will normally uphold unless “arbitrary, capricious, unreasonable, or lacked sufficient credible evidence in the record.

Note: The Ohio Supreme Court, in Lima v State, on June 10, 2009, 2009-Ohio-2597, held 5-2 that a state law prohibiting general residency requirements for public employees is valid and supersedes local laws that might require residency. https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2009/2009-Ohio-2597.pdf

For Ohio firefighters and other emergency responders, a political subdivision may require that they live in the county or adjacent county. ORC 9.481: http://codes.ohio.gov/orc/gp9.481

“To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state.”
Legal Lessons Learned: If unclear about records being requested, City had obligation to request clarification.

Note:

RECOVER ONLY FILING FEE: Ohio Rev. Code Section 2743.75(F)(3)(b): http://codes.ohio.gov/orc/2743.75

(b) The aggrieved person shall be entitled to recover from the public office or person responsible for the public records the amount of the filing fee of twenty-five dollars and any other costs associated with the action that are incurred by the aggrieved person, but shall not be entitled to recover attorney's fees, except that division (G)(2) of this section applies if an appeal is taken under division (G)(1) of this section.

RECOVER ATTORNEY FEES: Section 149.43: https://law.justia.com/codes/ohio/2006/orc/jd_14943-4d7.html

(C) If a person allegedly is aggrieved by the failure of a public office to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a public office or the person responsible for the public record to make a copy available to the person allegedly aggrieved in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section and that awards reasonable attorney's fees to the person that instituted the mandamus action. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

OH: CLEVELAND LOCAL 93 – PUBLIC RECORDS REQUEST FOR FD’s 2019 EXPENSE REPORTS – CITY RESPONSE WAS INADEQUATE

On Sept. 22, 2020, in Association of Cleveland Fire Fighters IAFF Local 93 v. City of Cleveland, Court of Claims of Ohio, Special Master Jeff Clark, after mediation, published his Report and Recommendations to the Court of Claim, findings that City failed to promptly produce Excel records showing 2019 expense records [Dec. 31, 2019
request; City produced some financial records Feb. 12, 2020, but FD expense records not produced until May 20, 2020]. If the City was unclear about the records being requested it had obligation under Ohio code to ask Local 93 to clarify. The only remedy, however, is $25 filing fee under Ohio Revised Code 2743.75(F)(3)(b). In order to recover attorneys fees, Local 93 would have had to file a mandamus action in Court of Common Pleas under Section 149.43.

“Presented with a request that it considered ambiguous, Cleveland had an obligation to ‘provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office’s or person's duties.’ R.C. 149.43(B)(2). When Local 93 contacted Cleveland on February 12, 2020 and objected that the record provided was not the record that it sought, Cleveland's proper response was not to offer that Local 93 could send another email (Response at 4), but instead to affirmatively inform Local 93 of the manner in which itemized expense reports for the Cleveland Division of Fire were maintained and accessed in the ordinary course of duty. As demonstrated in the record, Cleveland kept and used more than one such report.”

https://scholar.google.com/scholar_case?case=5871380462060471996&q=Association+of+Cleveland+Fire+Fighters+IAFF+Local+93+v.+City+of+Cleveland,&hl=en&as_sdt=6,36&as_vis=1

6-50

MD: EMT NECK INJURY – STATE STATUTE INCLUDED PARAMEDICS, FF BUT NOT “EMTs” – SHE IS COVERED

On Aug. 26, 2020, in Ashley N. Downer v. Baltimore County, Maryland, the Court of Special Appeals of Maryland, held (3 to 0) that EMTs are covered by the 1987 statute that awards increased compensation to a “public safety employee” injured on the job, even though the statute did not specifically include EMTs in its definitions [receives two-thirds of her average weekly wage, instead of one-third]. The Court reversed the Circuit Court trial judge and held:

“The Court concludes that the term "paramedic" was used by the legislature in accordance with its commonly understood meaning, and includes persons who are also known as emergency medical technicians. *** We conclude that Ms. Downer should have been considered a public safety employee within the definition of LE § 9-628(a)(1).”


Legal Lessons Learned: Nice to see Court broadly interpreting a workers compensation statute broadly.

6-49
WA: FF HEART ATTACK – FAMILY HISTORY - JURY FOUND CAUSED BY PLAQUE – STAT. PRESUMPTION OVERCOME

On Aug. 18, 2020, in Andrew P. Leitner v. City of Tacoma and Department of Labor And Industries, the Court of Appeals of the State of Washington, Division II, held (3 to 0; unpublished decision) that the trial court gave a proper instruction to the jury, and the jury’s verdict will not be reversed.

“Ultimately, the question of whether Leitner's other heart problems qualified for application of the statutory presumption was a factual question for the jury. The question of whether the Board incorrectly applied the presumption by failing to address Leitner’s other heart problems was also a question for the jury. Therefore, we conclude that Leitner's argument that the superior court erred by failing to reverse or modify the Board's findings and decision lacks merit.”  https://law.justia.com/cases/washington/court-of-appeals-division-ii/2020/52908-4.html

Legal Lessons Learned: Under the State of Washington statute, the employer can seek a jury trial on the issue of the cause of a firefighter’s heart attack.

Note: The State of Washington statutory presumption, RCW 51.32.185:
https://app.leg.wa.gov/rcw/default.aspx?cite=51.32.185

(1)(a) In the case of firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) who are covered under this title and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and public employee fire investigators, there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (iii) cancer; and (iv) infectious diseases are occupational diseases under RCW 51.08.140.

On April 24, 2019, the Governor signed an amendment to the statute, including additional cancers covered by the statutory presumption:

(10)(a)The director must create an advisory committee on occupational disease presumptions. The purposes of the advisory committee are to review scientific evidence and to make recommendations to the legislature on additional diseases or disorders for inclusion under this section. http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/1913.SL.pdf?cite=2019%20c%20133%20%C2%A7%2016-48

NY: FF WITH BAD HIP – CLAIMED ON DUTY INJURY CAUSED – DEGENTIVE HISTORY - GETS ONLY “ORDINARY” PENSION

On July 15, 2020, in the case of In the Matter of Robert Giuliano v. New York Fire Department Pension Fund, et al., the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, upheld (5 to 0) the
trial court’s decision denying the firefighter’s application for accidental disability retirement benefits; while he and his surgeon claimed likely caused by on the job injury, MRI showed degenerative history. Court wrote: “The Medical Board’s findings differ from those of the petitioner’s surgeon, who found that it was likely that the petitioner’s condition was causally related to work injuries and that the petitioner may have exacerbated a pre-existing condition. However, ‘[w]here conflicting medical evidence and medical reports are presented to the Medical Board, it is solely within the province of the Medical Board to resolve such conflicts.’”


Legal Lesson Learned: Appellate courts will generally follow the findings of a Medical Board, supported by medical documentation.

6-47

RI: FISCAL EMERGENCY – FIRE & POLICE RETIREES MUST NOW ENROLL IN MEDICARE - CITY MUST PAY GAP COVERAGE

On June 30, 2020, in Manuel Andrews, Jr. et al. v. James Lombardi, Treasurer of the City of Providence, Rhode Island, the Supreme Court of Rhode Island held (5 to 0) that the 2011 state statute authorizing municipalities to require retirees at age 65 to go on Medicare Part A was lawful, but the City of Providence must also pay for retiree supplemental benefits under Medicare Parts B & D, as the City had agreed in a settlement with some of the retirees. The Court wrote: “We are convinced nevertheless that the controversy ought to be resolved by awarding the plaintiffs the same remedies for health care as provided in the 2011 lawsuit’s settlement agreement approved in the 2013 Final and Consent Judgment. It is nothing more than what the City has agreed to provide for the opt-in retirees and indeed is contemplated in the 2011 Medicare Ordinance, which allows for the City’s payment of ‘Medicare supplement or gap coverage’ when ‘otherwise provided by ordinance or contract.’”


Legal Lesson Learned: State can enact a statute authorizing municipalities to require retirees to switch to Medicare coverage, but litigation may lead to settlements and Court decisions requiring the “gap” insurance is also paid by the municipality.

6-46

OH: FF SUES MAYOR – FIRST AMEND. RIGHT POST YARD SIGNS – UPSET CITY INSPECTOR DIDN’T FIND DEFECTS NEW HOME
On June 22, 2020, in Scott Solarz v. James Gaven & City of Olmstead Falls, U.S. District Court Judge Christopher A Boyko, U.S. District Court for Northern District of Ohio (Eastern Division), denied the Mayor’s motion to dismiss based on qualified immunity, but did dismiss the City on basis of governmental immunity as a defendant. Court wrote: “On May 14, 2019, Plaintiff attended a City Council meeting [he lives in City of Olmstead Falls, and is a firefighter with City of Rocky River]. Allegedly, Plaintiff and Defendant Graven had a heated exchange over the improper inspection [of his home in 2016] and the refusal to provide Plaintiff with reimbursement [for cost of arbitration with builder]. Plaintiff felt the Mayor treated him disrespectfully and caused him to suffer public humiliation. In June of 2019, Plaintiff created three yard signs - one was placed in his yard and the others in his two friends' yards. The signs read: ‘VETERANS AND FIRE FIGHTERS AGAINST NO HONOR MAYOR GRAVEN.’ *** According to the Complaint, in an effort to punish Plaintiff and to force him to remove the signs, Defendant Graven… contacted the Mayor of the City of Rocky River, the Fire Chief for the City of Rocky River, and Plaintiff's union president on or about June 29, 2019. *** Throughout the Complaint, Plaintiff alleges that Graven acted in his official capacity and/or under color of state law…. A mayor is a "person" who is constitutionally subject to liability under § 1983. Monell v. Department of Social Services, 436 U.S. 658 (1978). *** The Court concludes that, without some factual elucidation, it cannot find that Defendant Graven is entitled to qualified immunity.”

Legal Lessons Learned: Firefighters enjoy First Amendment rights to post yard signs involving personal matters; only limited rights concerning fire department matters.

Note: City of Olmstead Falls was dismissed from lawsuit since this case did not involve any City policy or ordinances, based on the U.S. Supreme Court decision in Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978), where the New York City Board of Education forced pregnant teachers to take medical leave before such leave was required for medical reasons. The U.S. Supreme Court held that NYC can be sued for damages for their unconstitutional policy, which the city wisely dropped.

6-45

MD: FF WITH HERNIA – DENIED WORKERS COMP – IN MARYLAND JUST “SPRAIN” – NOT OCCUPATIONAL DISEASE UNLESS CAUSED BY “ACCIDENTAL PERSONAL INJURY”

On May 28, 2020, in Justin Greer v. Montgomery County, Maryland, the Court of Special Appeals of Maryland held (3 to 0) that the Workers Compensation Commission, and the trial court properly denied the firefighter’s workers comp claim for inguinal (groin area) hernia. https://mdcourts.gov/data/opinions/cosa/2020/3381s18.pdf

Legal Lessons Learned: Courts when reviewing administrative agency decisions will generally give deference to the agency’s interpretation of a statute enforced by that agency.
OR: WORKERS COMP DENIED – FF WITH NON-HODGKIN’S LYMPHOMA – MEDICAL EXPERT DID NOT ESTABLISH THAT SMOKE EXPOSURE WAS MAJOR CONTRIBUTING CAUSE

On May 21, 2020, In The Matter Of The Compensation Of Alvin D. Rohrscheib, Claimant, 72 Van Natta 421, WCB Case No. 18-02473, the Oregon Workers’ Compensation Division, Reviewing Panel upheld (2 to 0) the Administrative Law Judge order that upheld the self-insured employer's denials of his occupational disease claim for non-Hodgkin's lymphoma.

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZmh5C6Al26quhK4NpqFpqP3dNIvTBMbQP47YmW18oezY

Legal Lessons Learned: Many states have now enacted statutory presumption laws, including Oregon. https://www.firstrespondercenter.org/cancer/toolsresources/presumptive-legislation-firefighter-cancer-state/


LA: HEARING LOSS – WORKERS COMP DENIED – UNDER LOUISIANA LAW ONLY IF LOSS FROM A SINGLE TRAUMATIC ACCIDENT


Legal Lessons Learned: Where hearing protection when on apparatus using siren, or near equipment with load noises.
PA: KIDNEY CANCER – FF RETIRED 2006, KIDNEY CANCER / SURGERY IN 2015 – PA 2011 STATUTORY PRESUMPTION LAW ALLOWS COVERAGE BACK TO 600 WEEKS

On May 6, 2020, in City of Johnstown v. Workers’ Compensation Appeals Board (Michael Sevanick), the Commonwealth Court of Pennsylvania held (3 to 0) in unreported decision that “Claimant timely filed his Petition, and it was supported by the substantial, competent evidence of record. The WCJ and the Board correctly applied the standards set out in the Act and in the pertinent case law.”

http://www.pacourts.us/assets/opinions/Commonwealth/out/1156cd19_5-6-20.pdf#search=%22Sevanick%22

Legal Lessons Learned: Fortunately, PA has enacted a statutory presumption statute that includes firefighters who retired within 600 weeks prior to enactment of the statute.

KY: HARASSMENT OF ATHEIST FF – SUPERVISOR TOOK NO ACTION, URGED RESIGN - RETALIATION CASE REINSTATED

On April 22, 2020, in Jeffery Queen v. City of Bowling Green, KY, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that the U.S. District Court judge in Bowling Green improperly dismissed the retaliation lawsuit against the plaintiff’s supervisor. The firefighter worked at Bowling Green FD for five years, and after one year he complained to his Supervisor. He was urged to quit, and no corrective action was taken; he finally resigned in May, 2016.

“A reasonable jury could conclude that [the Supervisor] Rockrohr’s subsequent conduct after receiving Queen’s complaint about the harassment he faced at the Bowling Green Fire Department (which conduct included Rockrohr’s suggestion that Queen ‘should get employment elsewhere’ because ‘things [were] not working out’) went far enough to amount to a materially adverse action. Indeed, Rockrohr’s specific admonition made directly to Queen that he ‘should get employment elsewhere’ could be interpreted by reasonable jurors to convey the message that Queen was no longer welcome at the Fire Department, thus amounting to a constructive termination of Queen’s employment.”


Legal Lessons Learned: When a firefighter complains of harassment, the FD Officer should promptly advise the Fire Chief, and promptly investigate and stop any harassment behavior.
AR: WORKER’S COMP DENIED - TESTICULAR CANCER – HAD AS YOUTH – NOT COVERED BY PRESUMPTION STATUTE

On April 21, 2020, Wesley Forbach v. The Industrial Commission of Arizona & City of Flagstaff, the Arizona Court of Appeal (Division One), held in unpublished opinion (3 to 0) that his surgery for removal of left testicle was not covered by worker’s comp. The Arizona statutory presumption statute requires proof that the “carcinogen is reasonably related to the cancer.” The proof was particularly difficult in this case since the firefighter as a teenage had testicular cancer and his right testicle was removed.

“The Administrative Law Judge (‘ALJ’) determined that Forbach was not entitled to a statutory presumption in his favor and, therefore, had not established a causal connection between his disease and his employment. We affirm.”

Legal Lessons Learned: Firefighters should keep a list of runs where they have been exposed to smoke or other chemicals, but even with such a list, without a State statutory presumption statute that specifically includes testicular cancer, it is very difficult to prove what caused this particular cancer.

Note: Court described the Arizona statutory presumption.

“Starting in 2001, with a significant amendment in 2017, the Legislature created a statutory presumption of industrial causation for firefighters and police officers who contract certain diseases under certain conditions. *** Arizona Revised Statutes section 23-901.01(B) lists diseases that, if contracted by firefighters or police officers, will be presumed to be occupational diseases that arose out of employment if the four requirements in subsection (C) of the statute are met…."

“3. The firefighter or peace officer was [i]exposed to a known carcinogen as defined by the international agency for research on cancer and [ii] informed the department of this exposure, and [iii] the carcinogen is reasonably related to the cancer.”

NC: WORKER’S COMP - DENIED FOR HEARING LOSS – MINOR MVA AMBULANCE - BACK INJURY WAS COVERED

On April 7, 2020, in Travis Martin v. WakeMed & Key Risk Management Services, the Court of Appeals of North Carolina held (3 to 0) in an unpublished opinion that the North Carolina Industrial Compensation properly denied the EMT’s claim for loss of hearing in both ears.

“The Commission found that the record evidence, including plaintiff’s testimony, did not reveal plaintiff ever discussing a loud noise or a certain degree of noise during the motor vehicle accident sufficient to cause
plaintiff to sustain asymmetric bilateral hearing loss. Moreover, the motor vehicle collision on 13 April 2016 “resulted in only minimal damage to [the vehicle plaintiff was driving].’ Based on the preponderance of evidence in view of the entire record, the Commission found that ‘insufficient evidence exists to establish a causal connection between the 13 April 2016 motor vehicle accident and [p]laintiff’s alleged injury to his ears, including bilateral hearing loss.”

https://appellate.nccourts.org/opinions/?c=2&pdf=38946

Legal Lessons Learned: With a minor MVA, it is difficult to understand the EMT’s claim that he lost hearing in both ears.

6-38

MD: WORKER’S COMP – GRANTED FOR ANKLE INJURY – AFTER SHIFT SPENT NIGHT AT STATION – AUTHORIZED

On April 7, 2020, in Montgomery County, Maryland v. John T. Maloney, the Court of Special Appeals of Maryland, held (3 to 0) that the FF, even though he was off duty, was entitled to workers comp, confirming the holdings of both the Workers Compensation Commission, and Circuit Court judge who held evidentiary hearing.

“In Maryland, employers must compensate ‘covered employee[s]’ for certain accidental personal injuries. Lab. & Empl. § 9-501. A compensable ‘accidental personal injury’ is one that ‘arises out of and in the course of employment.’ Lab. & Empl. § 9-101(b). At the end of the de novo evidentiary hearing, the circuit court concluded that Maloney’s firehouse injury met these criteria—that it arose out of and in the course of his employment. The County’s second appellate contention is that this conclusion by the circuit court was in error. To support its position, the County focuses mainly on the facts that Maloney was not on duty when he was injured, that he was not required to stay at Station 33 that night, and that he chose to stay there for his own convenience. These arguments are not persuasive.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZv4uc1sCbMG5dFxJ8lan7QREifr4yKlj8U3C7mB5N4Yr

Legal Lessons Learned: Given the fact that off duty firefighters are routinely allowed to spend the night at a station, it is hard to understand why the County fought this claim.

6-37

IL: VILLAGE RESIDENCY REQ. – FIRED – MARRIED CHICAGO TEACHER, PRIMARY RESIDENCE NOT MOTHER’S HOUSE

On March 31, 2020, in Anthony Figueroa v. The Board of Fire And Police Commissioners Of The Village of Melrose Park, Illinois, the Appellate Court of Illinois (First District) held (3 to 0) in unpublished decision, held that the trial judge in Circuit Court properly refused to overturn the Board’s decision to terminate the firefighter’s employment, even though he showed he had part-time residency in his mother’s home in the Village. The room he used in his mother’s house was also used by his mother.
“Giving the statutory language its plain and ordinary meaning, the Village’s residency requirement clearly and unambiguously provided that Figueroa had to live within the boundaries of the Village in a home that was his primary or most important residence throughout his period of employment. Contrary to Figueroa’s argument on appeal, the record establishes that the Board did not erroneously construe the ordinance to mean that he could not have more than one residence.”

https://courts.illinois.gov/R23_Orders/AppellateCourt/2020/1stDistrict/1181708_R23.pdf

Legal Lessons Learned: If the FF had purchased a home, or leased an apartment in the Village, took all his mail there, and kept Fire Chief informed, there may have never been charges brought.

Note: Some states, including Ohio, have abolished local residency requirements for emergency responders. See Ohio Revised Code 9.481, “reside either in the county where the political subdivision is located or in any adjacent county in this state.” http://codes.ohio.gov/orc/gp9.481

6-36

**TX: TESTICULAR CANCER – FF WORKERS COMP – CITY FAILED TO RAISE DEFENSE THAT FF DIDN’T FILE CLAIM WITHIN 1-YEAR**

On March 25, 2020, in City of Dallas v. Gregory D. Thompson, the Court of Appeals, Twelfth Court of Appeals District, Tyler, Texas held (3 to 0) that the firefighter is entitled to workers compensation coverage for his cancer.

“The record supports the ALJ’s determination that Dallas did not raise its defense regarding Thompson’s failure to file a claim within one year of his injury within a reasonable amount of time after it became available. Therefore, Thompson showed as a matter of law that Dallas waived its one-year defense. Accordingly, the trial court did not err in denying Dallas’s motion for summary judgment and granting Thompson’s cross-motion for summary judgment.”

http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0d5f8f8d-dca0-42cf-9f3d-0b9f0ec4a868&coa=coa12&DT=Opinion&MediaID=3cca35a6-dea2-4898-8844-a6d0a0f59f70

Legal Lessons Learned: Many states have now enacted a “statutory presumption” regarding firefighter cancer. See list of 33 states with statutory presumption statutes:

6-35

**IL: MANDATORY RETIREMENT FOR CHICAGO FF – AGE 63 – FF’S AGE DISCRIMINATION CASE DISMISSED**

On March 25, 2020, in Gerald Barry v. City of Chicago, U.S. District Court Judge John Robert Blakey, U.S. District Court for the Northern District of Illinois, Eastern Division, granted the City’s motion to dismiss. This is his fourth
amended complaint; the first three were dismissed because he failed to file an EEOC complaint within 300 days of the alleged discriminatory events.

‘Consistent with this new allegation, the operative complaint alleges that, on April 1, 2018, Plaintiff ‘lost the health care coverage that he had from the City of Chicago, resulting in a significant diminishment of his benefits.’ [39] at 5. He alleges that the loss of health care benefits is ‘consequential to the misapplication of the Mandatory Retirement Ordinance’ and that the City's decision to take away his health care coverage violates his rights under the ‘Lilly Ledbetter amendment to the Equal Pay Act.’

***

Thus, to state a claim under the ADEA, Plaintiff must at least allege that age was the reason for the challenged adverse employment action. E.g., Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009). And such an allegation is wholly absent here. Plaintiff checked the box marked ‘age’ on the Court's form employment discrimination complaint, see [39] at 3; Case No. 19 C 2275, [1] at 3, but he fails to allege any facts to support an age discrimination claim. He alleges that the loss of health care coverage ‘was a violation of his rights under the Lilly Ledbetter amendment to the Equal Pay Act,’ [39] at 5; [1] at 5, but he does not say why or how. He alleges that the loss of health care: resulted ‘from the discriminatory mandatory retirement on April 16, 2016’; was ‘consequential to the misapplication of the Mandatory Retirement Ordinance’; and was part of a "continual effort of discrimination." [39] at 5; [1] at 5. But he never explains why the forced retirement constituted a discriminatory action or how the City misapplied the MRO. https://public.fastcase.com/W1%2B2t%2BeVuI35%2FN70vAMFZqIZGQiBixrRs%2FhIZFdJSEICCe xWSoup5Rgc2fSfyUDA

Note: “As of December 31, 2000, the CFD’s compulsory retirement age is 63 for firefighters. There is no current compulsory retirement age for paramedics.” https://www.fabf.org/PDF/SummaryOfBenefits.pdf

Legal Lessons Learned: A city ordinance mandating a retirement age for firefighters does not violate the Age Discrimination in Employment Act of 1967, or the Lilly Ledbetter Fair Pay Act of 2009.

6-34

CT: RETIRED FF – WORKER’S COMP FOR HYPERTENSION – NOW CORONARY ARTERY DISEASE IS ALSO COVERED

On March 10, 2020, in John Coughlin v. Stamford Fire Department, et al., the Supreme Court of Connecticut held (7 to 0) that a firefighter who had a compensable workers comp claim approved in 2011, and retired in 2013, is also covered for heart disease detected after his retirement.

“The plaintiff responds that his heart disease claim was timely because it flowed from his compensable claim for hypertension, and neither a plain reading of § 7-433c nor this court’s interpretation of that statute requires hypertension and heart disease to be treated as separate diseases when they are causally related. We agree with the plaintiff and, accordingly, affirm the decision of the board.
It follows that a claim for a heart disease that occurred after an initial compensable claim for hypertension pursuant to § 7-433c may qualify for benefits without the need to file a new notice of claim, as long as there is a causal connection between the two injuries, as required by the act.

Legal Lessons Learned: A helpful decision that makes lots of sense; clear relationship between hypertension and later having coronary heart disease.

6-33

**LA: RIDING OUT-OF-RANK – INJUNCTION UPHELD - FD MAY NOT THREATEN FF WITH DISCIPLINE FOR REFUSING**

On March 4, 2020, in Brian Drumm, et al. v. City of Kenner, the Fifth Circuit Court of Appeals of Louisiana upheld (2 to 1) the trial court’s injunction.

“Kenner’s position, that the Fire Chief may force persons to work jobs outside their class against their will under threat of disciplinary action denies the existence of a voluntary, contractual agreement of employment in which both parties may freely negotiate their duties and responsibilities. Recognizing that plaintiffs’ employment with Kenner is a voluntary, contractual agreement, we conclude that the ‘appointment’ referenced in La. R.S. 33:2496 is in the nature of an offer and acceptance of employment. Forcing an employee to work out of class against his will under threat of discipline or other employment action is an unlawful act, and therefore plaintiffs were not required to show irreparable harm. Accordingly, we find Kenner’s argument that the district court legally erred in granting the preliminary injunction is without merit.

Legal Lessons Learned: Riding-out-rank is quite common in career FDs and is obviously a method to reduce overtime costs. The Court noted this testimony: “The interim Fire Chief testified that when he needed a captain for a shift, he did not ask already qualified captains to step in temporarily because paying them overtime is more expensive than paying lower ranked employees an extra $1.16/hour to work out of class.”

6-32

**NC: FIREFIGHTER / ALSO FD BOARD MEMBER – OPPOSED NEW AERIAL - FIRED – FREE SPEECH LAWSUIT TO PROCEED**
On March 2, 2020, in Michael Cole v. Andrew Weatherman & Lake Norman Volunteer Fire And Rescue Department, et al., U.S. District Court Judge Kenneth D. Ball, Western District of North Carolina (Statesville Division) held that the lawsuit may proceed; plaintiff was one of 20 paid firefighters on this “volunteer” fire department.

“Defendants contend that Plaintiff’s free speech claim fails because he was speaking as an employee on an internal LKNVFD (Lake Norman Volunteer Fire & Rescue Department) matter. The Court disagrees. Plaintiff’s Amended Complaint alleges that he was a member of ‘the statutorily authorized commission of the fire protection district, which administered the taxes levied for and appropriated to it by the County.’ (Doc. No. 13, at ¶ 11). This Board is comprised of employees and volunteers of the LKNVFD as well as members of the community at large. Id. Even though Plaintiff was an employee of LKNVFD, Plaintiff alleges that his statements opposing the purchase of the new truck were made as a citizen duly elected to the board and not as a firefighter exercising his job duties as an employee of LKNVFD. His comments on the wasteful expenditure of public money appropriated from a special tax levy on property in the fire protection district are adequately alleged to be a public matter, not purely an internal employment issue. See Pickering v. Bd. of Educ., 391 U.S. 563, (1968) (holding that a teacher's concerns about a school board's use of tax dollars was a matter of public concern); Urofsky v. Gilmore, 216 F.3d 401, 406-07 (4th Cir. 2000) (en banc) (noting speech upon matters of ‘social, political, or other interest to a community’ is protected under the First Amendment).

https://public.fastcase.com/W1%2B2t%2BeVuI35%2FN70vAMFZnbY8dI3hkArUDoxTqO4WI%2Fa6TeM7CmZuz1%2Ftkv0oKJ0

Legal Lessons Learned: Another decision reviewing the U.S. Supreme Court’s “balancing test.” FD need to use extreme caution in terminating a firefighter for speaking on matters of public concern, particularly if they also serve on the FD’s Board.

6-31

OH: CAPTAIN PROMOTION – SENIORITY POINTS ONLY FOR THOSE SCORED AT LEAST 70 – NEW SELECTION

On Feb. 5, 2020, in State ex rel. Michael A. Rimroth v. City of Harrison, the Ohio Court of Appeals for the First District (Hamilton County), held (3 to 0) that the promotion of the candidate who only scored 65 was inappropriate, since only the two candidates (plaintiff and one other) who scored 70 or higher were entitled to added points for seniority. The Court reversed the trial judge’s order for a new written test, since the test was fair. Case sent back to the city’s Civil Service Commission, and Mayor can now make a new promotion decision between plaintiff (scored 74) and the other candidate (scored 75).

“[Michael] Rimroth was a firefighter employed by the city of Harrison. On April 4, 2015, he took the written promotional examination for the position of fire captain, along with firefighters Dennis Helcher and Cameron Kugler. Kugler received a score of 75, Rimroth received a 74, and Helcher received a 65. A passing score for the examination was 70. As a result, only Kugler and Rimroth were listed as having passed the examination. *** In this case, both sides agree that it was inappropriate for the commission to include
the service credit before determining if the candidates received a passing score. We agree with this consensus. The issue that remains is determining if the trial court's remedy was proper and, if not, what remedy lies for the violation of the statute. *** The proper remedy, therefore, is to remand the cause to the civil service commission for the appropriate award of credit to only those individuals who had received a passing score on the written examination: Kugler and Rimroth. Once those scores are calculated, the commission should forward the resulting list for further consideration.”

https://www.leagle.com/decision/inohco20200205714

Legal Lessons Learned: Promotion processes should clearly specify when seniority and military credits can be added to test scores.

6-30

IL: HOUSE FIRE - FF FELL BACKWARDS, INJURED HER BACK – AWARDED LINE-OF-DUTY PENSION – CITY APPEAL DENIED

On Jan. 27, 2020, in City of Peoria v. The Firefighters Pension Fund of the City of Peoria and Angela Allen, the Appellate Court of Illinois, Third District, held (3 to 0) upheld the decision of the Board of Trustees of the pension fund to award line-of-duty death benefits. The city sought to reverse the Trustees, arguing the firefighter had a psychological disorder not caused by her fall.

“In reaching that conclusion, we reject the City's assertion that the Pension Board somehow erred by finding that Allen was disabled due to her psychological conditions when Allen's specific allegation in her disability pension application was that she was disabled due to a vestibular/ocular motor disorder. Although Allen listed her condition in the application as a vestibular/ocular motor disorder, many of the symptoms that Allen also listed in the application as being from a vestibular disorder were the same symptoms that Allen was found to be suffering from as a result of her psychological disorders. Thus, we believe that Allen sufficiently alleged the nature of her disability in her disability pension application. Indeed, the City has made no argument on appeal that it was surprised by the evidence presented or that the manner in which Allen's condition was described in the application somehow deprived the City of a fair opportunity to prepare for the hearing before the Pension Board.”


Legal Lessons Learned: Under Illinois statute and court precedents, pension applications by firefighters must be “liberally construed” in favor of the firefighter.

6-29

IL: PARAMEDIC LIFTING WEIGHTS – CLAIMED RIGHT FOOT INJURY – LATER VIDEOTAPED WORKING OUT, WALKING OK – CLAIM DENIED
On Dec. 27, 2019, in Brian Isenhardt v. Illinois Workers’ Compensation Commission, the Appellate Court of Illinois, First District / Workers’ Compensation Commission Division, held (5 to 0) that the Commission had properly denied the firefighter’s claim.

“The Village also called Erik Ekstrom, a private investigator hired to investigate the claimant. Ekstrom testified that, during his surveillance on January 13, 2015, he observed the claimant walking with a normal gait, taking out the trash, and performing chest exercises at the gym. According to Ekstrom, on January 15, 2015, he observed the claimant walking with a usual gait without the assistance of crutches on his entrance and exit from the gym. He also observed the claimant on the treadmill, lifting 50 to 70 pound weights above his head, while simultaneously lexing both ankles and standing on his ‘tippy toes,” without appearing to be in pain. Ekstrom recorded video during his surveillance, and a DVD of that video was admitted into evidence.

***

The Commission found the claimant’s testimony not credible and found his ‘subjective complaints’ of pain ‘questionable’ based on his ankle and foot MRIs, which did not reveal any acute pathology, as well as the testimonies of both [HR employee] Majda and Eriksom, who observed the claimant, subsequent to November 8, 2014, weightlifting and walking normally without assistance or apparent pain.”


Legal Lessons Learned: The private investigator’s video, and the report of the independent medical examiner, and testimony by HR employee, all led to denial of the claim.

6-28

PA: PHILADEFPHIA FF WITH LUNG CANCER – SMOKER – WILL RECEIVE WORKERS COMP BENEFITS – 2011 STATUTORY PRESUMPTION LAW

On Jan. 3, 2020, in Wayne Deloatch v. Workers’ Compensation Appeal Board (City of Philadelphia), the Commonwealth Court of Pennsylvania held (3 to 0) that the firefighter is entitled to benefits.

“During Claimant's firefighting career (20 years), he fought approximately 200-300 fires, including building, house, car, dumpster, trash, grass, and field fires, which exposed him to smoke. *** Claimant did not use the SCBA during exterior firefighting—i.e., outdoor firefighting—or overhaul, which entailed ‘ripping of walls, ceilings, searching for any hidden fire and extinguishing that if it's visible.’ … After exposure to each fire incident, Claimant's body would be coated in soot, and Claimant would often find soot in his nasal secretions up to a week after exposure…. Claimant further testified that he stopped smoking cigarettes in 2011, but had a 30 to 35-year-long smoking history… During that period, Claimant recalled smoking only one pack of cigarettes per week…. Firefighters were permitted to smoke in the fire stations, and Claimant worked with smokers during his career as a firefighter. *** For the reasons set forth above, Claimant established that he
was entitled to the statutory presumption under Section 301(f) of the Act, being that his lung cancer was caused by the occupation of firefighting. Employer failed to rebut the statutory presumption with substantial competent evidence that Claimant's cancer was caused by something other than his workplace exposure to IARC Group 1 carcinogens linked to lung cancer. 

https://public.fastcase.com/WL%2B2t%2BeVuI35%2FN70vAMFZi2NtCwkTvdiKyrWKXTmtjwARSxGp50rXf7QoqUpwr%2BO

6-27
RI: CRANSTON FF – 20 YRS ON FD - DIED COLON CANCER 2017 – RI SUPREME COURT DENIES WIDOW ACCIDENTAL DISABILITY PENSION

On Dec. 18, 2019 in Corrine A. Lang as Executrix of Estate of Kevin Land v. Municipal Employees’ Retirement System of Rhode Island, the Supreme Court of Rhode Island ruled (4 to 1) that the widow was not entitled to an award of accidental disability benefits, reversing the Appellate Division of the Workers’ Compensation Court.

“To conclude that the language in § 45-19.1-1 creates a conclusive presumption would not only render the statutory definition of occupational cancer in § 45-19.1-2(d) meaningless and create a right not found within the statute, but would also construe the statute to reach an absurd result. For example, a conclusive presumption that all cancers in firefighters are occupational cancers would mean that a firefighter who smoked four packs of cigarettes a day for decades would receive an occupational cancer disability benefit despite not having proved that his cancer was related to exposure on the job. Similarly, a conclusive presumption would provide occupational cancer benefits to a firefighter who contracted cancer as a result of exposure to pesticides while landscaping in his or her yard. We do not believe the General Assembly would have extended such broad benefits to all firefighters without expressly providing for such in clear and unambiguous language.”


Legal Lessons Learned: Hopefully the Rhode Island legislature will promptly amend the statutory presumption statute to clarify the burden of proof when firefighters have can be entitled to coverage.

6-26

NY: FDNY FF RESIGNED – PLED GUILTY TO FELONY - LYING TO FBI & DOJ – NO RIGHT TO REINSTATEMENT

On Nov. 8, 2019, in Stephen Mcanulty v. Fire Department of City of New York, NY Supreme Court / Kings County (Judge Katherine A. Levine), the judge held the FDNY had no obligation to rehire the firefighter eight years after he resigned.
In sum, petitioner has not shown that the FDNY in any way violated lawful procedure, or deviated from the standards set forth in the PRR (55 RCNY Appendix A) § 6.2.1(a) and (b), and POL § 30(1)(e). The court finds that respondent's determination was reasonably based on the facts and law, and was not arbitrary and capricious or an abuse of discretion. Therefore, the petition is denied. This constitutes the decision and order of the court.”

Legal Lessons Learned: FDNY was legally barred from reinstating a convicted felon whose conviction had never been vacated.

6-25

WA: FF BRAIN MELANOMA - WINS PERMANENT DISABILITY – PREV. DENIED TEMPORARY DISAB, MELANOMA ON BACK

On Oct. 17, 2019, in Michael Weaver v. City of Everett and State of Washington, Department of Labor & Industries, the Supreme Court of State of Washington, held (9 to 0) that the firefighter’s melanoma was an occupational disease entitling his to permanent disability benefits, even though the State had previously denied him temporary disability.

“We conclude that the substantial disparity of relief between Weaver's temporary and permanent disability claims kept Weaver from fully and vigorously litigating the issue at the temporary disability claim stage. Therefore, because applying the doctrine in this instance would work an injustice and contravene public policy, we hold that collateral estoppel does not apply.”

Legal Lessons Learned: Nice to see Court supporting a firefighter’s cancer claim, to avoid an “injustice.”

6-24

OH: FD LT. DEMOTED WITHIN 1-YR OF PROMOTION – NOT “PROBATIONARY EMPLOYEE” – MAY FILE GRIEVANCE / ARBITRATION

On Sept. 18, 2019, in Steve Conti v. Mayfield Village, U.S. District Court Judge James S. Gwin, U.S. District Court for the Northern District of Ohio, denied the City’s motion for summary judgement, and rejected the City’s claim that the Lieutenant “did not have a property interest in his probationary lieutenant position.”

Judge Gwin wrote:
“Defendant points to the ‘Fire Lieutenant, Class B – Probationary’ position in Section 21.1’s salary schedule as support its reading that Plaintiff was a probationary employee. However, the placement of the undefined term ‘Probationary’ after a promotional position without further explanation is hardly dispositive of this matter. Defendant’s argument ignores the other CBA references to probationary employees that distinguishes between probationary employees and promoted employees.

Legal Lessons Learned: If promoted personnel are to be treated as “probationary” for the first year after probation, clearly state this in the CBA or Employee Handbook. See Sept. 18, 2013 article and photo – hiring Steve Conti and two other firefighters:  https://patch.com/ohio/mayfield-hillcrest/mayfield-village-introduces-three-new-firefighters

6-23

IL: BACK INJURIES - COURT AWARDS “ON DUTY” DISABILITY - CUMULATIVE EFFECT OF FIREFIGHTING

On Sept. 6, 2019, in Jerry Valadez v. Harvey Firefighter’s Pension Fund, et al., the Appellate Court of Illinois, First Judicial District / 6th Division, held (3 to 0) that the firefighter is entitled to a “on duty” disability. 2019 IL App (1st) 181900-U (Ill. App., 2019).  

Justice Harris wrote opinion, overturning the Administrative Board:

“Although the Board agreed with Dr. Pelinkovic and Dr. Gleason that plaintiff was permanently disabled, it disagreed with their determination that the October 21, 2015, incident, or the cumulative effects of acts of fire fighting, contributed to his disability. Instead, they credited Dr. Graf’s opinion that plaintiff’s condition is solely the result of his preexisting lower back issues. *** Dr. Graf’s decision to place great weight on plaintiff’s MRIs, with no consideration of whether plaintiff’s extrication of a victim weighing over 300 pounds and another over 200 pounds could have aggravated his preexisting condition, renders his opinion unreliable.”

Legal Lessons Learned: Overturning Administrative Board decision is rare; the firefighter made an excellent record with testimony of two treating physicians.

6-22

PA: CAN’T RETIRE AT AGE 50 –CITY AND UNION IN CBA ESTABLISHED MINIMUM AGE AT 55

On March 25, 2019, in Joseph C. Bongivengo v. City of New Castle Pension Plan Board and The City of New Castle, the Commonwealth Court of Pennsylvania held (3 to 0):

“This ruling also disposes of Bongivengo’s argument that the City violated Section 607(e) of Act 205 because it did not engage in collective bargaining before it implemented the new age and years of service
requirements. As noted above, the City and the Union did collectively bargain for the age and years of service requirement, as first reflected in the 1992 CBA and subsequently in every CBA thereafter.”


Legal Lessons Learned: City and Union agreement controls minimum retirement age.

6-21

OH: FF CANCER - LUMBAR SPINE LYMPHOMA – CITY CONTESTED – FF FILED FOR COSTS / ATTY FEES, CITY LATE IN RESPONDING, MUST PAY

On May 23, 2019, in Robert T. Rodgers v. City of Rocky River, et al., 2010 Ohio 2006 (Ohio App, 2019), the Ohio Court of Appeals for Cuyahoga County (3 to 0), upheld the trial court’s order that City reimburse the firefighter for his costs and attorney fees of $3,734.45.

“[W]e note that the plain language of R.C. 4123.512(F) authorizes the award of attorney fees and costs against ‘the employer’ who contests an injured worker’s right to participate in the workers’ compensation system after an injured worker’s right to participate is established. The statute does not differentiate between public and private employers, unlike in R.C. 4123.01(B) where the legislature provided different definitions of “employers” — public (political subdivisions) and private. This demonstrates that the legislature had the ability to establish immunity for political subdivisions or public employers from an award of attorney fees and costs, but elected not to do so.


Legal Lessons Learned: City failed to timely appeal award of costs and attorney fees; no statute protects city from liability for court cost and attorney fees.

6-20

IL: FF KIDNEY CANCER – WORK. COMP. GRANTED – EXPERT WITNESS CAUSED BY JOB, NOT OBESITY & HYPERTENSION

On May 10, 2019, in City of Peoria v. Illinois Workers’ Compensation Commission (Bryan Grant), the Appellate Court of Illinois, Third District, Workers Comp Division, held (5 to 0) that the firefighter’s cancer was caused by the job.

“By finding that the petitioner’s workplace exposures to carcinogenic gases caused his kidney cancer, the Illinois Workers’ Compensation Commission did not make a finding that was against the manifest weight of the evidence.”

Legal Lessons Learned: Many states, including Illinois, have now enacted a statutory presumption on FF cancer. But some employers are contesting claims, particularly if FF has poor health history.

See also this article on 2017 case involving Illinois firefighter who suffered a heart attack. “In this case, the petitioner was an obese smoker, mildly diabetic, and with a family history of heart disease.”

http://inmanfitzgibbons.com/illinois-wc-alert-rebutting-the-6f-presumption/
The Court further quoted the bill sponsor as saying, “[s]o don’t think it’s conclusive that simply because you have lung cancer, you’re going to get compensation of the Worker’s Compensation Act. What we’re saying is, we’ll get you to the hearing. Then the other side can bring in evidence that you smoked for thirty (30) years and therefore, it wasn’t a result of the actions taken at work.” Id. at 82. Johnston v. Illinois Workers’ Comp. Comm’n, 2017 IL App (2d) 160010WC.

6-19

NJ: FF’s BACK INJURY - PLASTIC CHAIR COLLAPSED - PRIOR BACK ISSUES – NOT “ACCIDENTAL” DISABILITY, ONLY “ORDINARY” DISAB.

On May 10, 2019, in Terrence Crowder v. Board of Trustees, Police & Firemen’s Retirement System, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that Deputy Chief was not entitled to 72.7% accidental disability retirement, only “ordinary” disability retirement (43.6%).

“The 2008 incident was not the direct cause of Crowder's disability. Rather, as the ALJ correctly found, Crowder's preexisting degenerative condition, which was aggravated by the 2008 incident, was the essential significant or the substantial contributing cause of his disability.”


Legal Lessons Learned: Aggravating a pre-existing degenerative condition does not meet the requirements of the state statute. Suggestion - get rid of plastic chairs in the station.


“According to the state Treasury’s website, an ordinary disability retirement pays 43.6 percent of an employee’s salary averaged over his or her last three years of service. In contrast, an accidental disability retirement pays 72.7 percent of the base salary at the time of the ‘traumatic event.’”

6-18

NY: FDNY APPLICANT - PLED GUILTY MJ – CIVIL SERVICE COMM. PUT HIM BACK ON ELIGIBILITY LIST – LIST NOW EXPIRED - NOT HIRED
On April 18, 2019, In The Matter Of The Application Of Christopher Redden v. The City of New York, a judge on NY Supreme Court, Kings County, denied the applicant’s request to be placed on a “special eligible list.” Redden v. City of N.Y., 2019 NY Slip Op 50647(U) (N.Y. Sup. Ct., 2019). “Being named on an eligible list does not create any vested right to be appointed; at most it conveys the right to be considered and the possibility of an appointment. *** Thus, the FDNY, as a civil service department, has the discretion to disqualify a candidate on the eligible list who has been found guilty of a crime. https://law.justia.com/cases/new-york/other-courts/2019/2019-ny-slip-op-50647-u.html

Legal Lessons Learned: After eligibility list expires, applicant must wait for next exam. If he is then too old to apply, then he is without a remedy.

6-17

PA: FIREFIGHTER TRIED TO RETIRE AT AGE 50 – BUT CITY AND UNION IN CBA SET THE MINIMUM AGE AT 55 – STATE MIN. OF 50 NOT APPLY

On March 25, 2019, in Joseph C. Bongivengo v. City of New Castle Pension Plan Board and The City of New Castle, the Commonwealth Court of Pennsylvania held (3 to 0): “This ruling also disposes of Bongivengo’s argument that the City violated Section 607(e) of Act 205 because it did not engage in collective bargaining before it implemented the new age and years of service requirements. As noted above, the City and the Union did collectively bargain for the age and years of service requirement, as first reflected in the 1992 CBA and subsequently in every CBA thereafter.” http://www.pacourts.us/assets/opinions/Commonwealth/out/877CD18_3-25-19.pdf?cb=1

Legal Lessons Learned: Firefighters represented by a union are bound to the terms of the CBA, including minimum age until eligible to retire.

6-16

MI: FIRE CHIEF RESIGNED, TOWNSHIP ISSUED PRESS RELEASE - NOT DEFAMATION OR “FALSE LIGHT”

On Feb. 26, 2019, in Richard Marinucci v. Charter Township of Northville, et al., State of Michigan Court of Appeals, held (3 to 0) in an unpublished decision,

“Further, plaintiff offers no evidence to show that informing the public that he had resigned was unreasonable or highly objectionable. Although plaintiff contends that the statements made to the media placed him in a false light, plaintiff does not explain how the statements negatively affected him.”
Legal Lessons Learned: When a Fire Chief resigns, the employer may report this fact to the press. Avoid financial situations where there may be an “appearance of impropriety.”

6-15


On Feb. 8, 2019, in Paul H. Schneider v. City of Lawrence, the Court of Appeals of State of Kansas (3 to 0), overturned the Workers Compensation Board, and granted the firefighter’s claim for coverage of two on-duty back injuries (2008; 2010). Kansas statute requires workers comp request for a hearing be filed within 3 years of the injury, or “within two years of the date of the last payment of compensation.” The Court held,

“Here, because Schneider received compensation from the City in December 2015 and in January 2016 and because he filed his applications for hearings in January 2016, his applications under the revived two-year statute of limitations were timely.”


Legal Lesson Learned: Workers comp statutes of limitation are designed to require prompt disclosure of workplace injuries. The City may decide to appeal this decision to the Kansas Supreme Court.

Note: See Aug. 4, 2017 article: “Ohio General Assembly Alters Statute of Limitation for Workers' Compensation Claims”


“As part of the biennial budget process the Ohio General Assembly passed House Bill 27 to create the workers compensation budget for 2018-2019. In addition to establishing the budget the bill also amended sections of the Ohio Revised Code that relate to workers compensation law. Mainly among the changes, the bill shortens the statute of limitations for an employee to file a workers compensation claim against Ohio Employers.

Current law requires an employee to bring a workers’ compensation claim within two years from the date of injury or death. Effective September 29, 2017, all workers compensation claims must be filed within one year from the date of injury or death. After that date, if new claims are not brought within the one year limitation the claim will be forever barred and there can be no recovery. All claims with a date of injury after September 29, 2017 are subject to the new limitation. The amendment attempts to strike a balance between allowing a sufficient time for a claim to be brought while not prejudicing employers by allowing claims to be filed long after any contemporaneous evidence has since vanished.”
OH: FIRE CHIEF’S AGE / ADA LAWSUIT DISMISSED – DIDN’T FILE WITH EEOC – MUST EXHAUST ADMINISTRATIVE REMEDIES


“Plaintiff Keller claims that Defendants discriminated against him because of his age and his disability in violation of federal law by requiring him to complete a physical examination. However, Plaintiff needed to file his age and disability discrimination claims with the Equal Employment Opportunity Commission (‘EEOC’) before bringing this lawsuit. Because Plaintiff has not exhausted his administrative remedies, the Court dismisses his federal discrimination claims without prejudice.”

Legal Lessons Learned: (1) FDs should have written policy regarding when personnel on leave will be required to pass medical or physical fitness for duty testing, and any retraining of job skills; and (2) must timely file EEOC charge to pursue federal ADA case.

See U.S. Department of Justice web:
“Filing a Complaint with the Equal Employment Opportunity Commission.
If you think you have been discriminated against in employment on the basis of disability, you should contact the U.S. Equal Employment Opportunity Commission (EEOC). A charge of discrimination generally must be filed within 180 days of the alleged discrimination. You may have up to 300 days to file a charge if there is a State or local law that provides relief for discrimination on the basis of disability. However, to protect your rights, it is best to contact the EEOC promptly if discrimination is suspected. After your complaint is filed with the EEOC, the EEOC investigates the charge. If the EEOC determines that there is reasonable cause to believe that the charge is true, the EEOC attempts to conciliate or settle the charge. If conciliation is unsuccessful, the EEOC refers charges against state and local government employers to the Department of Justice. The Department of Justice makes a determination whether to bring a lawsuit based on the charge. If it decides not to bring a lawsuit, the Department issues to the charging party a notice of right to sue. Charges against private employers are retained by the EEOC for a determination of whether to bring a lawsuit based on the charge or issue a notice of right to sue.”

PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SUE HOSPITAL [also filed, Chap. 13]

On Nov. 21, 2018, in Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al., the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital.

“We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees’ sensitive personal information stored by the employer on an internet-accessible computer system.”
Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.

**6-12**

**U.S. SUPREME COURT: AGE DISCRIMINATION ACT APPLIES PUBLIC AGENCIES – EVEN LESS 20 EMPLOYEES**

On Nov. 6, 2018, in *Mount Lemmon Fire District v. Guido, et al.*, the U.S. Supreme Court (8 to 0) held:

“that state and local governments are ‘employer[s]’ covered by the ADEA regardless of their size” [while private employers are only covered if have 20 or more employees]. [https://www.supremecourt.gov/opinions/18pdf/17-587_n7ip.pdf](https://www.supremecourt.gov/opinions/18pdf/17-587_n7ip.pdf)

Legal Lessons Learned: The two former Captains may now proceed with their lawsuit. Fire & EMS departments, when conducting layoffs, should carefully document their rational for any layoffs not involving the “last hired.”

See 9th Circuit decision:

“John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009, Guido at forty-six years of age and Rankin at fifty-four.” [https://caselaw.findlaw.com/us-9th-circuit/1864754.html](https://caselaw.findlaw.com/us-9th-circuit/1864754.html)


**6-11**

**TN: FIRE CHIEF FIRED – AT-WILL EMPLOYEE – COUNTY CAN’T GRANT CIVIL SERVICE PROTECTION**

On Oct. 19, 2018, in *William Smallwood v. Cocke County Government*, the U.S. Court of Appeals for 6th Circuit (Cincinnati, OH), held (3 to 0) in an unpublished opinion, that the District Court properly granted summary judgment to the County. “Regardless of whether Smallwood’s termination was politically motivated, as Fire Chief, he could be terminated for political reasons.” [http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0522n-06.pdf](http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0522n-06.pdf)
Legal Lessons Learned: At-will employees may be terminated without a hearing.

6-10

NY: AMBULANCE BACK STEP NOT LOWERED - FF ENTITLED TO ACCIDENTAL RETIREMENT BENEFITS [also filed, Chap. 13]

On Sept. 6, 2018, In The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller, the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an “accident” on the “malfuctioning piece of equipment that was designed, under normal circumstances, to promote safety.” [link]

Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.

6-9

MD: PARAMEDIC WITH DEGENERATIVE KNEE TEARS – JURY FOUND WORK RELATED – COURT UPHOLDS

On Aug. 30, 2018, in Baltimore County v. Michael Quinlan, the Court Of Special Appeals Of Maryland, held (3 to 0) that his menisci tears are work related. The Court wrote:

“In sum, Mr. Quinlan met the statutory requirements of LE § 9-502(d)(1) by establishing at trial that the degenerative menisci tears were an occupational disease through testimony that showed that repetitive kneeling and squatting is (1) a regular part of a paramedic’s job and (2) a risk factor for developing menisci tears, which Dr. Cochran explained are ‘part of the continuum of osteoarthritis. ‘…. This was sufficient evidence for the jury to determine that, ‘but for the work-related activities[,]’ his condition would not have developed…. We will not second guess the jury’s fact finding on appeal.” [link]

Legal Lessons Learned: Expert testimony particularly critical for claims involving degenerative knee or other similar conditions.
LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT [also filed, Chap. 13]
On July 18, 2018, in Patrick Alan Benfield & Brian Warren v. Joe Magee, et al., U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled:

“The motion [to dismiss] is DENIED as to Warren’s free speech claim because the facts alleged establish that his letter was protected speech.”

Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

6-7

WY: VOLUNTEER FIREFIGHTERS MAY BE IN UNION – STATE STATUTE
[also filed, Chap. 18]
On July 6, 2018, in IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson, the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly constituted fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.

Legal Lessons Learned: Drafting of legislative language is very important, along with creating a clear “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.
On June 21, 2018, in Borough of Madison v. Kevin Marhefka, the Superior Court of New Jersey / Appellate Division (2 to 0) held

“As the Borough's complaint sought only to collect that unenforceable $5000 penalty, the complaint was properly dismissed with prejudice regardless of whether the penalty was negotiated with the PBA.”


Legal Lessons Learned: Penalties for resigning to take a new job are often challenged, and difficult to enforce, as compared to reimbursement for training costs and equipment. Some states impose training costs on the new public employer, such as NJ (2013 statute).

https://law.justia.com/codes/new-jersey/2013/title-40a/section-40a-14-178/

40A:14-178 Liability for training costs; terms defined.

1. a. Whenever a person who resigned as a member of a county or municipal law enforcement agency is appointed to another county or municipal law enforcement agency, the police department of an educational institution pursuant to P.L.1970, c.211 (C.18A:6-4.2 et seq.), a State law enforcement agency or the New Jersey Transit Police Department pursuant to section 2 of P.L.1989, c.291 (C.27:25-15.1) within 120 days of resignation, and that person held a probationary appointment at the time of resignation or held a permanent appointment for 30 days or less prior to resignation, the county or municipal law enforcement agency, educational institution or State law enforcement agency appointing the person, or the New Jersey Transit Corporation, is liable to the former county or municipal employer, as appropriate, for the total certified costs incurred by the former employer in the examination, hiring, and training of the person.

VA: THROAT CANCER – RETIRED FF GETS WORKERS COMP – BUT NOT HEALTH INSURANCE

On June 7, 2018, in Eddie R. Jones, Sr. v. Commonwealth of Virginia, the VA Supreme Court (7 to 0) held: “Throat cancer is properly considered an occupational disease which arose out of Jones’s employment. He is entitled to and has been awarded benefits under the Workers’ Compensation Act. However, the occupational disease did not result in a disability while Jones was still carrying out his duties as a firefighter. Therefore, he is not entitled to insurance benefits under Code § 9.1-401(B), because he does not meet the definition of a ‘disabled person’ under the Act.”

http://www.courts.state.va.us/opinions/opnscvwp/1170639.pdf

Legal Lessons Learned: At least 34 states have now enacted statutory presumptions, with wide variety of coverages. This case illustrates the importance of clear statutory language about disability benefits when cancer is detected after retirement.

See these resources:

http://client.prod.iaff.org/#contentid=48598;
PA: BREAST CANCER – RETIRED FF GETS MEDICAL COVERAGE BACK TO DATE OF RETIREMENT

On June 1, 2018, in City of Pittsburg and UPMC Benefit Management Systems, Inv. v. Workers Compensation Appeal Board (Flaherty), the Commonwealth Court of Pennsylvania upheld (3 to 0) the Board, “holding that Anne Marie Flaherty (Claimant) gave notice to Employer within 21 days of when she knew or should have known that her cancer was work-related. Because Claimant gave notice within 21 days, she was entitled to benefits from September 10, 2004, the date she left work due to her injury, as opposed to September 23, 2011, the date she filed her claim petition.” [https://caselaw.findlaw.com/pa-commonwealth-court/1897108.html]

Legal Lessons Learned: Timely notice of claim is important, even with statutory presumption.

U.S. SUP. COURT – ENFORCES ARBITRATION AGREEMENTS – EMPLOYEE CAN’T SUE [also filed, Chap. 17]

On May 21, 2018, in Epic Systems Corp. v. Lewis, the U.S. Supreme Court (5 to 4), 584 U.S. ____ (2018), in a decision written by newly appointed Justice Gorsuch, held:

“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.” [https://www.supremecourt.gov/opinions/17pdf/16-285_q811.pdf]

Legal Lessons Learned: This decision is one of the most important businesses cases before the Court. Many employers, including private ambulance companies, will now be encouraged to have new hires sign an arbitration document.
AFL-CIO President Richard Trauma was quoted, “Five justices on the Supreme Court decided that it is acceptable for working people to have their legal rights taken away by corporations in order to keep their jobs.” [https://www.sfgate.com/news/article/Supreme-Court-rules-that-companies-can-require-12931130.php](https://www.sfgate.com/news/article/Supreme-Court-rules-that-companies-can-require-12931130.php)

Note: see Jan. 15, 2019 U.S. Supreme Court decision in New Prime, Inc. v. Oliveira, **Holding**: A court should determine whether the Federal Arbitration Act’s Section 1 exclusion for disputes involving the “contracts of employment” of certain transportation workers applies before ordering arbitration; here, truck driver Dominic Oliveira’s independent contractor operating agreement with New Prime Inc. falls within that exception. **Judgment**: **Affirmed**, 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion. Justice Kavanaugh took no part in the consideration or decision of the case. [https://www.scotusblog.com/case-files/cases/new-prime-inc-v-oliveira/](https://www.scotusblog.com/case-files/cases/new-prime-inc-v-oliveira/)

6-2

**MD: COLLECTIVE BARGAINING – COUNTY MUST BARGAIN OVER CHANGE IN HEALTH INSURANCE BENEFITS**

On March 28, 2018, in O’Brien Atkinson, et al v. Anne Arundel County, the Court of Appeals of Maryland, held (3 to 0) that the County cannot unilaterally change health benefits; case is remanded to trial court.

“We leave it to the parties and trial court, applying the balancing test on remand, to ascertain the scope of collective bargaining rights over health insurance benefits as mandated under §§ 811 and 812 of the Charter.” [file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/CTCRXJ99/0788s16.pdf](file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/CTCRXJ99/0788s16.pdf)

**LEGAL LESSONS LEARNED:** The County Charter mandated collective bargaining and arbitration.

6-1

**RI: “DISABLED” FF IS VIDEOTAPED WEIGHTLIFTING – DISABILITY PENSION BENEFITS TERMINATED** [also filed, Chap. 16]

On Feb. 20, 2018, in John Sauro v. James Lombardi, in his capacity as Treasurer of the City of Providence, et al., the State Supreme Court held,

“we conclude that the decision of the trial justice declaring that the plaintiff’s pension benefits should be reinstated and he should be placed on a waiting list to resume active service was erroneous, overlooked material evidence, and was clearly wrong.” [https://www.courts.ri.gov/Courts/SupremeCourt/SupremeOpinions/16-170.pdf](https://www.courts.ri.gov/Courts/SupremeCourt/SupremeOpinions/16-170.pdf)

**LEGAL LESSONS LEARNED:** Accidental disability pension benefits are for those with a continuing workplace injury; cases like this can lead to public perception of pension fraud.
On Act. 27, 2020, in Donna Griffin v. City of Chicago, U.S. District Court Judge Sara L. Ellis, Northern District of Illinois, denied City’s motion to dismiss the lawsuit; plaintiff may pursue claim that the CFD administered physical fitness tests solely to eliminate women from the Academy, leading to her injury and termination April 11, 2019, and the City’s refusal to allow her to re-apply after she failed a return-to-work Independent Medical Exam in June 2019 (she was prescribed medications for insomnia and adjustment disorder).

“In October 2016, Griffin (who was known as Donna Ruch at the time) and several other female paramedics filed the Livingston lawsuit, alleging that the City discriminated against them based on their sex. In connection with the parties' attempts to make progress in settling Livingston, the City agreed to conditionally hire Griffin as a CFD Fire Paramedic candidate pending medical processing.

***

The relevant question is whether Griffin has plausibly alleged that discriminatory and retaliatory motives were the bases underlying the City's June 2019 denial of her application. She has. Griffin alleges that the City ‘refused to allow her to enter a subsequent training academy’ class because of her gender, her complaints about illegal sex discrimination, and her disability. Griffin, Doc. 1 ¶¶ 17, 18, 21, 24-26. She further alleges that the City has allowed men who use alprazolam or trazodone—the medications that Griffin had taken or was taking when she went through the medical evaluation process in March and April 2019—to train and work as Fire Paramedics and that the City has also allowed individuals who have not complained of discrimination to use these medications while training or working as Fire Paramedics. These allegations plausibly state claims for relief based upon the City's June 2019 denial of Griffin's application.”

Legal Lesson Learned: Plaintiff may now proceed with pre-trial discovery, including how the FD has medically dealt with male firefighters using the same medications.
NY: FEMALE FF ON RUN – MALE FF MASTERBATED INTO PANTS SHE HAD LEFT AT STATION – NO PAY AWAITING ARBITRATION

On July 17, 2020, in the case In The Matter Of Thomas Cacone v. City of Utica, the Supreme Court of State of New York, Appellate Division, Judicial Department, held (5 to 0) that trial court improperly ordered the FD to put the firefighter on paid leave awaiting the arbitration more than 30 days; the arbitration was delayed because the firefighter sought disciplinary records of another firefighter who apparently did similar misconduct. Court wrote: We agree with respondents that petitioner is not entitled to reinstatement or back pay because petitioner was solely responsible for the delay.”
https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZvXmXpQwu2GjlHh16DzgzKzYNu%2FX9mokA K5AXod7BJ9cF

Legal Lessons Learned: The conduct described is totally unacceptable.

7-23 [also filed, Chap. 16]

KY: FF MET 17-YEAR-OLD AT FIRE STATION – CONVICTED HAVING SEX WITH MINOR - TOOK VIDEOS AND PHOTOS

On July 7, 2020, in United States of America v. William Michael Fields, U.S. District Court Chief Judge Danny C. Reeves, Eastern District of Kentucky, denied the defendant’s motion for judgment of acquittal, or a new trial. The Court wrote: “Based on the foregoing, there was ample evidence from which the jury could have concluded that, on March 17 and 23, 2019, Fields employed, used, persuaded, induced, or coerced the minor victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct and that the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate commerce by any means, including computer.”
https://casetext.com/case/united-states-v-fields-198

Legal Lesson Learned: A firefighter having sex with a minor can be convicted of a federal offense if a video or photos is posted on Internet.

7-22

U.S. SUPREME COURT: HOMOSEXUAL AND TRANSGENDER EMPLOYEES COVERED BY TITLE VII

On June 15, 2020, in Gerald Lynn Bostoc v. Clayton County, Georgia, (plus two other combined cases), held (6 to 3) that an employer cannot fire or otherwise discriminate against someone simply for being a homosexual or transgender. Justice Neil Gorsuch wrote: “Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a
different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

Legal Lessons Learned: This is a “landmark” decision. Fire & EMS Departments should review their non-discrimination policies to include sexual orientation and gender identity.

7-21

**TX: HOUSTON FD – U.S. DEPT. JUSTICE LAWSUIT – MALES URINATING WALLS, FLOORS, SINKS WOMENS’ BATHROOM – COLD WATER SHOWERS DISCONNECTED / SPEAKERS**

On May 15, 2020, in United States of America, Jane Draycott and Paula Keyes v. The City of Houston, Texas, Senior U.S. District Judge Sim Lake, Southern District of Texas (Houston Division) issued a lengthy opinion denying the City’s motion to dismiss case. U.S. Department of Justice Press Release of Feb. 28, 2018 is eye opening. “The lawsuit, filed in the Southern District of Texas, alleges that Jane Draycott and Paula Keyes were subjected to a hostile work environment based on sex when they were employed as firefighters at HFD’s Station 54. According to the complaint, HFD’s hostile work environment included males urinating on the walls, floors and sinks of the women’s bathroom and dormitory, disconnecting the cold water to scald the women while they were showering, and deactivating the female dormitory’s announcement speakers so the women could not respond to emergency calls. The complaint further alleges that the conduct culminated in death threats and vulgar slurs written on the walls of their work and living spaces at Station 54 and on their personal possessions. This conduct continued despite at least nine complaints made to management, according to the allegations.”
https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-city-houston-sex-discrimination-and-retaliation [Jane Draycott later resigned from FD; Paula Keyes is now a Captain.]
https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZkY2nPIYZ3wtfvlBy3YjdhH4Hysc14LIFQvAQrJXsfUWa

Legal Lessons Learned: Case is now scheduled for trial; serious allegations.

7-20 [Also posted, Chap. 14]

**AL: PREGNANT EMT – DENIED LIGHT DUTY – AMR CO. PROVIDES ONLY INJURED ON JOB - LAWSUIT REINSTATED**

On April 17, 2020, in Kimberlie Michelle Durham v. Rural/Metro Corporation, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the U.S. District Court judge had improperly granted summary judgment to AMR.

“We therefore vacate the grant of summary judgment. Neither a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Since neither can meet the lifting requirement, they are the same in their ‘inability to work’ as an EMT. And that satisfies the plaintiff’s prima facie requirement to establish that she
was ‘similar [to other employees] in their ability or inability to work.’"


Legal Lessons Learned: Congress in enacting the Pregnancy Discrimination Act did not specifically address the issue of light-duty; hopefully the U.S. Supreme Court in a future case will give clear direction on this issue.

7-19

**FL: FEMALE FF RESIGNS, 20 YRS ON FD – CLAIMS HOSTILE WORK ATMOSPHERE, FEW SPECIFICS – CASE DISMISSED**

On April 1, 2020, in Colleen Moore v. San Carlos Park Fire Protection & Rescue, the U.S. Court of Appeals for the 11th District (Atlanta) held (3 to 0) in unpublished opinion that the trial court properly granted the FD’s motion to dismiss. Moore resigned on November 5, 2013, after more than 20 years of service.

“While the complaint lists a series of discrete acts, it does not provide the dates of those acts or mention the supervisor responsible for any alleged acts. Similarly, her EEOC charge alleges Moore was harassed, called ‘the girl,’ and disciplined more severely than men, but does not provide any details supporting those allegations. Without connecting names or dates to each incident, we cannot determine who committed the acts or when they were committed. See Morgan, 536 U.S. at 120. Thus, Moore has not established that the three timely adverse acts are sufficiently related to any of the other complained of acts, such that they support the same hostile work environment claim.


Legal Lessons Learned: Fire & EMS departments should have Employee Handbooks requiring employees to promptly file complaints in writing.

7-18

**TX: “JANE DOE” LAWSUIT DISMISSED - FEMALE FF MUST IDENTIFY HERSELF IN NEW LAWSUIT – CITY, SEVERAL FF DROPPED FROM CASE**

On March 10, 2020, in Female Firefighter Jane Doe v. Fort Worth, Texas, et al., U.S. District Court Judge John McBryde, U.S. District Court for Northern District of Texas, Fort Worth Division, ordered that Plaintiff re-file her lawsuit and identify herself. Only one firefighter remains in the case, since 2-year statute of limitations has run on all her other claims. The City is also dismissed from the case.
“The law is clear that a plaintiff should only be allowed to proceed anonymously in rare and exceptional cases. Doe v. Stegall, 653 F.2d 180 (5th Cir. Unit A 1981); Southern Methodist Univ. v. Wynn & Jaffe, 599 F.2d 707 (5th Cir. 1979). Plaintiff has made no attempt to show that this is such a case, probably because she cannot make the required showing. That plaintiff might suffer personal embarrassment is not enough. Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992). "Indeed, many courts faced with a request by a victim of sexual assault or harassment seeking to pursue a civil action for monetary damages under a pseudonym have concluded that the plaintiff was not entitled to proceed anonymously." Doe ex rel. Doe v. Harris, No. 14-0802, 2014 WL 4207599, at *2 W.D. La. Aug. 25, 2014 (citing cases). Accordingly, the court will require plaintiff to identify herself. Fed. R. Civ. P. 10(a).

***
If, as plaintiff contends, she was raped by her co-workers, that was not the result of an intentional choice of City not to provide proper training, especially where plaintiff does not allege that City was ever informed that lack of training was causing its male firefighters to engage in criminal conduct.”
https://www.leagle.com/decision/infdco20200316488

Legal Lessons Learned: A plaintiff should only be allowed to proceed anonymously in rare and exceptional cases. [I have deleted names of the defendants in this case, since Plaintiff hasn’t identified herself.]

7-17

IL: JOKES ABOUT FF BEING “GAY” [HE IS NOT] – CASE DISMISSED – 3 OCCASIONS - NOT AN “OBJECTIVELY” HOSTILE WORK ENVIRONMENT


The Seventh Circuit set a high bar to establish an objectively hostile work environment. Courts ‘assume employees are generally mature individuals with the thick skin that comes from living in the modern world.’ Swyear, 911 F.3d at 881. Employers ‘generally do not face liability for off-color comments, isolated incidents, teasing, and other unpleasantries that are, unfortunately, not uncommon in the workplace.’ Id. Jokes that are ‘crude’ and ‘immature’ do not create employer liability, even though the jokes are ‘boorish,’ inappropriate, and in poor taste.

***
The set of facts stated in Bakker’s Complaint provides no possible path to employer liability. Accordingly, the Title VII claim must fail. Further, because the December 2015 and July 2018 incidents are time-barred and because the August 2018 incident alone cannot establish liability, the Title VII claims must be dismissed with prejudice.”
https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZpwObr9UCo7RpbGKfgPOWwVQBI%2BjVLV%2FylH6ScWLGBY%2F

Legal Lessons Learned: It’s great to have fun on duty; but jokes about sexual orientation are not appropriate.
PA: PREGNANT MEDIC – SUPERVISOR COMMENTS – MAY SOON “HATCH”
- NOT HOSTILE WORKPLACE – SHE WAS SUSPENDED FOR CAUSE


“Plaintiff also contends that Defendant's employees repeatedly urged her to begin maternity leave prior to the birth of her child, and prior to the date required and directed by her doctor. When Supervisor John Applegate (‘Supervisor Applegate’) encouraged Plaintiff to go out on leave earlier than Plaintiff had planned, he told her that he would ‘save her spot’ for twelve weeks. Supervisor Applegate made the following comments to Plaintiff while she was pregnant: 1) Plaintiff’s shirt looked like ‘a tent,’ 2) Plaintiff looked like she was ‘ready to pop,’ 3) Plaintiff should not work too hard because she may ‘hatch,’ and 4) Plaintiff should let him know ‘if [she] hatch[es].’ *** “[T]his Court finds that the record does not contain any evidence to support a nexus between Plaintiff’s pregnancy and her suspension. The record clearly reflects, and Plaintiff repeatedly acknowledges, that she was suspended for accusing a coworker of benefiting from nepotism. Although Plaintiff baldly contended in her complaint that the proffered reason for her suspension was pretextual and baseless, she continually acknowledges that she was suspended because of her statements about Matthew not being subject to discipline due to his familial relationship with a supervisor. Because there is no nexus between Plaintiff's pregnancy and her suspension, she cannot satisfy the fourth element of her pregnancy discrimination claim. Therefore, summary judgment is granted in favor of Defendant with respect to Plaintiff's pregnancy discrimination claim.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZsLQ8Zjgb2jk542DjlxpVQs5PCG3jEwwTTQV0VgsrBHY

Legal Lessons Learned: Great quote by Court: “As the United States Supreme Court has continuously held, Title VII ‘does not set forth a general civility code for the American workplace.’ Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).”

7-15

PA: FEMALE EMS INSTRUCTOR FIRED – RUDE TO STUDENTS & STAFF – NOT GENDER DISCRIMINATION

“Simply put, the undisputed facts do not suggest that Brandt's employment was terminated due to discrimination in which she was less favored than her male colleagues. By contrast, the record is filled with evidence that suggests her termination was due to her mistreatment of students and unprofessional behavior toward staff. Accordingly, the court will grant the motion of defendant for summary judgment as to Brandt's claims for gender discrimination under Title VII.”

Legal Lessons Learned: Prompt and thorough investigation by employer established breach of Code of Conduct.

7-14

AR: PUMP BREAST MILK WHILE ON DUTY – FD SPACE “FREE FROM INTRUSION” – $3.8M JURY SET ASIDE / $250K TO SETTLE

On Feb. 24, 2020, in Carrie Ferrara Clark v. City of Tucson, U.S. District Court Judge Cindy K. Jorgenson, District Court for District of Arizona, has given plaintiff thirty days to accept $250,000, or the case must be retried to another jury. The first jury, after 10 days of trial, awarded her $3,800,000.

“Plaintiff has been an employee of the City of Tucson Fire Department (‘TFD’) since 2007. In July 2012, Plaintiff gave birth to her first son, Austin Clark, and decided to breastfeed while on maternity leave and to pump breast milk when she returned to work. Plaintiff breastfed Austin while on maternity leave and contacted her superiors at TFD to ensure she would have a proper place to pump and express breastmilk when she returned to work. Upon her return to work, Plaintiff believed that the lactation spaces she was being provided were not legally compliant and initiated the underlying lawsuit in 2014. *** “The Court finds Defendant's first issue regarding a grossly excessive jury verdict to be sufficient and will not address, in detail, the merits of the remaining issues…. Defendant's Motion for Remittitur is granted in the amounts provided above [$250,000]. Plaintiff has thirty (30) days with which to accept or decline the Remittitur.”

Legal Lessons Learned: Plaintiff must now either accept the lower amount or have new trial. Employers, including fire & EMS departments must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”

https://www.law.cornell.edu/uscode/text/29/207
GA: PRIVATE AMBULANCE – MGR’S OCCASIONAL SEXUAL COMMENTS
EMT - WORKED OUT TOGETHER – LAWSUIT DISMISSED

On Jan. 16, 2020, in D’Marius Allen v. AmbuiStat, LLC, the U.S. Court of Appeals for the 11th Circuit (Atlanta), in unpublished decision, upheld the U.S. District Court’s grant of summary judgment for the private ambulance company.

“At issue in this case is the fourth element -- whether the harassment was severe or pervasive. As we have explained, ‘Title VII is not a civility code, and not all profane or sexual language or conduct will constitute discrimination in the terms and conditions of employment.’ *** Here, Allen points to five isolated comments. These sporadic comments, spread over four months, can hardly be described as frequent. Further, the comments appear to have been said in a joking manner, and in the overarching context of Allen being friendly with Santos (or working out together in a gym). Indeed, Allen admitted she was ‘friends outside of work’ with Santos and Rita. *** In short, Allen’s pervasiveness argument fails to pass muster. Plainly, Santos engaged in unsavory and unpleasant conduct. However, as we have emphasized, this type of boorish behavior, with this kind of frequency, is insufficient to constitute pervasiveness for a sexual harassment action under Title VII. After reviewing Allen’s claims, and comparing them against those in which this Court has rejected claims of pervasive harassment, we are required to come to the same conclusion.”


Legal Lessons Learned: The manager’s comments to the EMT were clearly inappropriate; if the EMT did not admit to being “friends” and working out together, this lawsuit might have proceeded to trial.

7-12

KS: FEMALE FIRE INSPECTOR - NEW SCBAs / EXCUSED FROM SCBA TRAINING – RESIGNED - NOT HOSTILE WORKPLACE


“The Airpack training incident involved Bermudez asking to be excused from the confidence course, the training chief excusing her, and someone else then making some mild comments to Conway [another female Inspector who didn’t take curse]. Within a week or two, the TFD Twitter account posted a picture of Martin [Fire Marshal; plaintiff’s supervisor] with the caption, ‘No one is immune from training.’ But the tweet featured Martin and did not mention Bermudez. The Court finds that this conduct, even when considered collectively, is not sufficiently severe or pervasive that it would dissuade a reasonable worker from engaging in protected activity…. Both incidents were very tame and neither was even outwardly directed at Bermudez. A remark that someone should do firefighter training to consider themselves a fire inspector and then tweeting that no one is immune from training is, at worst, rude or mildly passive aggressive. But it does not objectively rise to the level of conduct that would dissuade a reasonable employee from engaging in protected conduct…. It is well established that Title VII is not ‘a general civility code for the American workplace.’ Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)). Nor is it the Court’s role ‘to mandate that certain
individuals work on their interpersonal skills and cease engaging in inter-departmental personality conflicts.’ Somoza v. Univ. of Denver, 513 F.3d 1206, 1218 (10th Cir. 2008). https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2018cv4141-61


7-11

IL: CHICAGO FD – PARAMEDIC PHYSICAL FITNESS TESTS – 100% MALES, ONLY 79% FEMALES – LAWSUIT TO PROCEED

On Jan. 14, 2020, in Jennifer Livingston, et al. v. City of Chicago, U.S. District Court Judge Sara L. Ellis, U.S. District Court, Northern District of Illinois, Eastern Division, denied the City’s motion to dismiss. Twelve (12) female candidates for Firefighter Paramedic positions filed the lawsuit; 8 had timely filed EEOC charges within 300 days and received “Right To Sue” letters.

“The City moves to dismiss Bain, Ruch, Youngren, and Venegas (the ‘Non-Filing Plaintiffs’) because they have not exhausted their administrative remedies, as required by Title VII. Because the Non-Filing Plaintiffs can rely on the single-filing rule to bring their claims based on the charges filed by other plaintiffs in this case, the Court denies the City’s motion to dismiss.

***

To bring a Title VII suit, a plaintiff must have exhausted her administrative remedies by filing a timely EEOC charge and receiving a right to sue letter. Allen v. City of Chicago, 828 F. Supp. 543, 555 (N.D. Ill. 1993). Certain exceptions to this rule exist: under the single-filing rule or “piggybacking” doctrine, “an individual who has not exhausted his administrative options may join a lawsuit filed by another individual who has administratively exhausted.” Simpson v. Cook County Sheriff’s Office, No. 18-cv -553, 2018 WL 3753362, at *2 (N.D. Ill. Aug. 8, 2018); see also Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1017–18 (7th Cir. 1988).” https://cases.justia.com/federal/district-courts/illinois/ilndce/1:2016cv10156/332956/114/0.pdf?ts=1547636381

Legal Lessons Learned: Lawsuit may proceed; physical ability tests that have an “adverse impact” on female applicants have been subject of litigation, including U.S. Department of Justice cases. See EEOC review of litigation involving physical agility tests: “Recruitment & Hiring Gender Disparities in Public Safety Occupations” (June 2018): https://www.eeoc.gov/federal/reports/upload/pspe.pdf [pages 12-13].

“Once employers could no longer segregate women into peripheral jobs, they began using screening tests for public safety occupations. Initially, height and weight restrictions were used in some public safety jobs to screen applicants, because it was thought that taller and heavier people were more able to perform the
presumed physically demanding duties of these jobs. In 1977, the Supreme Court addressed this issue when it rejected an Alabama prison facility’s height and weight restriction because it led to an unjustified disproportionate exclusion, or a ‘disparate impact’, on women. [Dothard v. Rawlinson, 433 U.S.321(1977).]

When height and weight restrictions thus fell by the wayside, they were replaced by physical ability tests (PATs) to qualify applicants for public safety positions…. PATs were gender-neutral, requiring the same performance for men and women. This still led to a disparate impact on women who had comparable physical fitness levels as qualified men, but could not reach the required threshold of agender-neutral test.

[Footnote 17]: In cases involving a state or local government’s use of PATs to screen law enforcement applicants, the Department of Justice (DOJ), not the EEOC, has authority to bring any lawsuit on behalf of the government…. The DOJ has challenged PATs as discriminatory against women. See ,e.g., Lanning v. Southeastern Penn. Transp. Auth.,181 F.3d 478 (3dCir.1999); United States v. Massachusetts, 781 F.Supp.2d 1(D.Mass.2011) (challenging PAT that has disparate impact against women for prison guard jobs); United States v. City of Erie, 411F.Supp.2d 524 (W.D.Pa.2005)(finding for plaintiff DOJ that unitary PAT for police officers created a disparate impact and the defendant failed to prove that requiring a unitary test time was sufficiently job-related.”

**7-10**

**TX: DEP. FIRE CHIEF RESIGNED AFTER HE FACED TWO SEXUAL HARASSMENT INVEST – LAWSUIT DISMISSAL UPHELD**

On July 10, 2019, in Carlos Mandujano v. City of Pharr, Texas, the U.S. Court of Appeals for the Fifth Circuit held (3 to 0; unpublished opinion ) that the U.S. District Court judge had properly dismissed his lawsuit claiming the City’s investigations created a hostile work environment and resulted in his “constructive discharge.”

“Mandujano’s sex-discrimination claim rests on a theory that the City’s investigations into him created a hostile work environment and resulted in his constructive discharge. To state a claim of constructive discharge, a plaintiff must allege that working conditions became ‘so intolerable that a reasonable person would have felt compelled to resign.’ Pa. State Police v. Suders, 542 U.S. 129, 147 (2004). Mandujano’s initial complaint did not plausibly allege that this occurred.”


**Legal Lessons Learned:** Fire & EMS departments, like other employers, have an obligation to investigate claims of sexual harassment; individuals being investigated may obviously feel uncomfortable, but that does not support a claim of hostile workplace.  Note: On Sept. 4, 2019 the 5th Circuit filed replacement opinion, but with same conclusion – lawsuit properly dismissed: http://www.ca5.uscourts.gov/opinions/unpub/18/18-40561.1.pdf
PA: PHILADELPHIA FD – FIRST FEMALE DEPUTY COMM. – LAWSUIT FOR HOSTILE WORKPLACE DISMISSED


“At her deposition, Schweizer admitted time and time again that she had no facts to support her belief that her gender underlay the treatment of which she complained. She may indeed have developed a hunch that she would have been treated better if she had been a man, but this is not enough to survive summary judgment.”


Legal Lessons Learned: The EEOC’s description of workplace harassment includes following: “Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.” https://www.eeoc.gov/laws/types/harassment.cfm

7-8

IL: CHICAGO FEMALE MEDICS (5) SUE FOR INADEQUATE INVEST – MAY SEE COMPLAINT / INVESTIGATION FILE OF MALE RIDE-ALONG

On July 9, 2019, in Jane Does 1-5 v. City of Chicago, U.S. District Court Magistrate Judge Sunil R. Harjani granted the plaintiffs’ motion to compel the City to produce a male student’s allegation that the City’s fire department’s employee sexual assaulted and harassed him during an observational ride-along.

“Differing treatment of one gender’s sexual misconduct allegations, compared to the other gender’s treatment, has been found to indicate ‘an informal yet established custom or policy of discrimination’ against one gender while treating the other gender’s complaints more seriously. Hicks v. Sheahan, No. 03 C 0327, 2004 WL 3119016, at *18 (N.D. Ill. 2004). *** Specifically, Plaintiffs’ motion seeks the student’s complaint, the OIG Report, witness statements, documents detailing the allegations, and documents that reflect the outcome of the investigation into the student’s allegation. *** Plaintiffs argue that these documents are relevant to compare how Defendant treats male versus female sexual misconduct complainants. *** Here, the Complaint’s Monell [Monell v. Dep’t of Social Services, 436 U.S. 658 (1978)] claim alleges, in part, that Defendant had a discriminatory policy or practice of failing to adequately investigate and discipline its employees accused of sexual misconduct.”https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2018cv03054/351942/211/

To prevail on a Monell claim, a plaintiff must show that: ‘(1) the City had an express policy that, when enforced, causes a constitutional deprivation; (2) the City had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority.’” https://cases.justia.com/federal/district-courts/illinois/ilndce/1:2018cv03054/351942/211/0.pdf?ts=1558430418

NE: FEMALE FF “HOSTILE WORKPLACE” LAWSUIT MAY PROCEED – JUDGE REF. MALE CAPTAIN’S $1.1M JURY VERDICT AGAINST FD

On April 22, 2019, in Manda Benson v. City of Lincoln, Senior U.S. District Court judge Richard G. Kopf, denied the City’s motion to dismiss:

“In yet another lawsuit[Footnote 1] alleging that employees of the City of Lincoln and Lincoln Fire and Rescue ... discriminated against, retaliated against, and created a hostile work environment for female firefighters on the basis of sex and/or national origin, Plaintiff Amanda Benson asserts in her Second Amended Complaint (Filing No. 18) the following causes of action (‘COA’) against the City of Lincoln and eight other Defendants in their individual and official capacities... Footnote 1: See Hurd v. City of Lincoln (No. 4:16CV3029) (D. Neb. 2016) and Giles v. City of Lincoln (No. 4:17CV3050) (D. Neb. 2017). *** Footnote 9: The court takes judicial notice of the jury verdict in the amount of $1,177,815.43 in Hurd v. City of Lincoln, No. 4:16CV3029, Filing No. 250 (D. Neb. Feb. 26, 2019), in favor of Troy Hurd and against the City of Lincoln on Hurd's Title VII and NFEPA claim that he was retaliated against after complaining about sexual and national-origin discrimination of a fellow female LF&R firefighter and the resulting hostile work environment. Hurd had complained about the discrimination and hostile work environment to LF&R personnel, City management, and the NEOC/EEOC.” https://casetext.com/case/benson-v-city-of-lincoln

Legal Lessons Learned: The lawsuit will now proceed to trial; Federal juries have returned some very large verdicts.


AL: PREGNANT EMT—SEEKS “LIGHT DUTY” - EEOC SUPPORTING HER APPEAL TO 11TH CIRCUIT

On Feb. 11, 2019, in Kimberly Michell Durham v. Rural / Metro Corporation, the Equal Employment Opportunity Commission has filed an amicus brief with the 11th Circuit (Atlanta), arguing:

“The PDA [Pregnancy Discrimination Act] does not categorically bar employers from maintaining a policy of accommodating only a subset of employees, including those employees with on-the-job injuries. See [U.S. Supreme Court’s 2015 decision in Young v. UPS] 135 S. Ct. at 1349-51. However, Young allows that a jury may find that an employer’s policy of accommodating only some employees is a pretext for pregnancy discrimination.”

https://assets.documentcloud.org/documents/5745041/Eeoc.pdf [Page 31]

Legal Lessons Learned: This is an important case for the fire service, and may eventually reach the U.S. Supreme Court.


IL: 12 FEMALES FAILED FITNESS TESTING IN CHICAGO FD PARAMEDIC RECRUIT SCHOOL MAY SUE

On Jan. 14, 2019, in Jennifer Livingston, et al. v. City of Chicago, U.S. District Court Judge Sara L. Ellis, held: “Because the Non-Filing Plaintiffs can rely on the single-filing rule to bring their claims based on the charges filed by other plaintiffs in this case, the Court denies the City’s motion to dismiss.”

https://cases.justia.com/federal/district-courts/illinois/ilndce/1:2016cv10156/332956/114/0.pdf?ts=1547630986

Legal Lessons Learned: Physical fitness tests, whether during Recruit School or prior to hiring, that have an adverse impact on females, should be validated by an expert.

See EEOC guidance, “Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.”

https://www.eeoc.gov/policy/docs/factemployment_procedures.html

See EEOC June 13, 2018 press release: “CSX Transportation to Pay $3.2 Million To Settle EEOC Disparate Impact Sex Discrimination Case… According to the EEOC’s lawsuit, CSXT conducted isokinetic strength testing as a requirement for workers to be hired for various jobs. The EEOC said that the strength test used by CSXT, known as the ‘IPCS Biodex’ test, caused an unlawful discriminatory impact on female workers
seeking jobs as conductors, material handler/clerks, and a number of other job categories. The EEOC also charged that CSXT used two other employment tests, a three-minute step test seeking to measure aerobic capacity and a discontinued arm endurance test, as a requirement for selection into certain jobs, and that those tests also caused an unlawful discriminatory effect on female workers.”
https://www.eeoc.gov/eeoc/newsroom/release/6-13-18.cfm

7-4

AL: PREGNANT EMS – NOT ENTITLED TO LIGHT DUTY, COMPANY POLICY ONLY IF INJURED ON THE JOB

On Oct. 9, 2018, in Kimberly Michelle Durham v. Rural/Metro Corporation, Case No. 4:16-CV-01604-ACA, U.S. District Court Judge granted summary judgment to the employer. Three male EMTs had been granted light duty for injuries to their backs while lifting patients. The court held,

“Rural/Metro contends that Ms. Durham must offer substantial evidence of employees placed on light duty assignment who were injured off the job in order to survive summary judgment. This court agrees.”


7-3

MI: FEMALE CAPTAIN NOT SELECTED AS FIRE CHIEF – LACK OF INCIDENT COMMAND

On Aug. 30, 2018, in Ona Lee Aguilar v. City of Saginaw and IAFF Local 102, the State of Michigan Court of Appeals held 3 to 0 (in unpublished opinion) upheld the dismissal of her lawsuit by trial court.

“Aguilar is one of a small number of female employees of the Saginaw Fire Department (SFD) and has dealt with harassment and hostility over the years as she worked her way up the ranks in a male-dominated field. Aguilar’s suit, however, was based solely on the city’s 2013 failure to name her as acting or interim fire chief and its 2014 failure to hire her as the city’s permanent fire chief. The evidence supports that Aguilar’s union discriminated against her and those parties reached a settlement. Although the evidence also supports that Aguilar continues to work in a hostile environment, Aguilar has not created a triable question of fact on her discrimination claims. Accordingly, we are bound to affirm.”
Legal Lessons Learned: Lack of experience in Incident Command is a legitimate, nondiscriminatory reason for not selecting an applicant for Fire Chief.

7-2

LA: SEXUAL HARASSMENT COMPLAINT PROMPTLY INVESTIGATED – OFFENDER WARNED
On June 5, 2018, in Shelita Tucker v. United Parcel Service, Inc., the U.S. Court of Appeals for the 5th Circuit, held (3 to 0) in an unpublished opinion that the federal district judge properly granted summary judgment to UPS:

“We agree with the district court that Tucker failed to discharge her burden to raise a fact issue in this regard. UPS's remedial actions stopped the sexual harassment, and McCaleb neither spoke to nor touched Tucker again. Although McCaleb's presence at work made her feel uncomfortable, Tucker said she was still able to perform her duties.”  

Legal Lessons Learned: Fire & EMS employers should likewise get statements, investigate and take prompt corrective action.

7-1

FL: FEMALE CANDIDATE FOR FIRE CHIEF NOT SELECTED – NOT GENDER DISCRIMINATION, BOTH CANDIDATES HIGHLY QUALIFIED
On Jan. 19, 2018, in Shari Hall v. Marion County Board of County Commissioners, the District Court of Appeal of State of Florida, 5th District, held that:

“Appellant failed in her burden of proving the county offered pretextual reasons, and thus failed to establish a case of gender discrimination using circumstantial evidence.” Case was remanded so Court can next dispose of retaliation claim.  
http://www.5dca.org/Opinions/Opin2018/011518/5D17-1183.op.pdf

Legal Lessons Learned: Two well-qualified qualified candidates for Fire Chief; no proof of gender discrimination. Caution when current Chief tells subordinate that they are likely the next Chief.
Chap. 8 Race Discrimination

8-24 [Also filed, Chap. 9 -17]

FL: FDNY CHANGED GROOMING POLICY – REQUIRES CLEAN SHAVE – NOW ON APPEAL – JACKSONVILLE FF LAWSUIT


Judge Weinstein’s decision:

“Defendants admit that no heightened safety risk to firefighters or the public was presented by the accommodation previously in effect. Two and a half years passed without incident, and Plaintiffs continued to perform their jobs satisfactorily. The FDNY's decision to abandon the prior accommodation was not based on any actual safety risks to firefighters or the public. Rather, driving the calculus was bureaucracy. Defendants cite no case law indicating that such bureaucratic considerations are a viable undue hardship defense; the court declines to so find.” https://casetext.com/case/bey-v-city-of-ny-7

Legal Lesson Learned: The FDNY case will now be decided by the U.S. Court of Appeals for the Second Circuit. The Jacksonville FD case will proceed to pre-trial discovery.
On Nov. 23, 2020, in Aaron Mitchell v. City of Newport, et al., U.S. District Court Judge L. Scott Coogler, U.S. District Court for Northern District of Alabama (Western Division), granted the City’s motion for summary judgment, finding the Fire Department offered nondiscriminatory explanations for suspending him. He was suspended in 2017, and later failed promotion exam for Sergeant, and in 2018 he was not permitted to apply for promotion to Lieutenant.

“Even if Mitchell had established a prima facie case, Defendants again offered nondiscriminatory explanations for suspending him: he threatened a colleague, he cursed a colleague, and he destroyed a colleague’s property. (Doc. 57 at 46.) Because Mitchell offered no new evidence or arguments suggesting these explanations are pretext for retaliation, summary judgment is due to be granted.”

Legal Lesson Learned: The FD investigated and documented their findings, as well as prior discipline.

On Oct. 22, 2020, in Robert Patterson v. City of Detroit, et al., the State of Michigan Court of Appeals held (3 to 0) in an unpublished decision, that the trial court judge properly denied the City’s motion for summary judgment concerning race discrimination allegations in the complaint. The probationary firefighter’s internal investigation was shoddy, and he was treated much more harshly than a non-probationary African American firefighter who had posted a racially insensitive item.

“The evidence indicates that both plaintiff and Bragg should have received substantially the same kind and intensity of investigation, impartiality, and benefit of any doubt. Because a violation of the zero-tolerance policy would seem to constitute ‘cause,’ it is irrelevant that plaintiff was at-will and Bragg was not. Because the real-world effect of both plaintiff’s conduct and Bragg’s conduct dramatically affected working conditions, the fact that one occurred on City premises and the other occurred on social media does not seem relevant. *** The trial court correctly denied summary disposition as to Counts I and III, being plaintiff’s claims for race-based discrimination under the ELCRA and 42 USC § 1981.”

Legal Lesson Learned: Even an “at will” probationary firefighter is entitled to a thorough investigation prior to making a termination decision.

Note: The Court of Appeals also held trial court judge properly dismissed plaintiff’s defamation claim against the Fire Commissioner for issuing a Press Release after plaintiff was terminated. “[T]he evidence...
indicates that Jones’s issuance of the press release was within the scope of his authority as Fire Commissioner. Therefore, he is entitled to absolute immunity for any defamatory (or false light invasion of privacy) content within that press release.”

The October 6, 2017 Press Release read:

“There is zero tolerance for discriminatory behavior inside the Detroit Fire Department. On Saturday, Sept. 30, 2017, at Engine 55, a trial firefighter (probationary employee) engaged in unsatisfactory work behavior which was deemed offensive and racially insensitive to members of the Detroit Fire Department. After a thorough investigation, it was determined that the best course of action was to terminate the employment of this probationary employee.”

8-21

OH: EMS CAPTAIN (BLACK) SHIFT CHANGED – SO WHITE CAPTAIN ON EACH SHIFT – UNFAIR, INCONVENIENT - BUT NOT TITLE VII VIOL.

On Oct. 8, 2020, in Michael Threat, et al. v. City of Cleveland, U.S. District Court Judge James S. Gwin, Northern District of Ohio, granted the City’s motion for summary judgment. Five African-American Captains sued, after the EMS Commissioner changed the shift of Captain Reginal Anderson from his requested day shift to night shift; the Commissioner wanted at least one Caucasian Captain with more seniority on duty.

“Not all undesirable or unfair work conditions that employees face are material for purposes of Title VII. ‘Reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions.’ Plaintiff Anderson's shift change, while unfair and inconvenient, does not rise to the level of a materially adverse employment action. A change to night shift ‘is not materially adverse without some reduction in pay, prestige, or responsibility.’ Anderson's shift change did not affect the basic terms of his employment; it merely temporarily affected when he worked and who he worked with. Anderson's family life preference for day shift does not change things. Courts employ an objective standard for Title VII materiality. Working night shift is not objectively less desirable than day shift or viewed by the City or EMS Commissioner as a duty performed by lower-ranking employees. In fact, two captains more senior than Anderson each used their top bids on A-key and B-key nights.”

https://casetext.com/case/threat-v-city-of-cleveland

Legal Lesson Learned: Staffing decisions based on race can lead to litigation and poor workplace morale; should be carefully reviewed with legal counsel prior to implementation.

8-20
On Sept. 23, 2020, in Miami-Dade County v. Faye Davis, the Third District Court of Appeal, State of Florida, held (3 to 0) that the trial judge improperly granted the plaintiff’s motion for a new trial.

“We hold that the evidence supported the jury’s verdict, in which it determined that the County did not deny Davis a promotion during the 2009-10 and 2010-11 promotional cycles based on her race or sex, and further determined that the County did not deny her a promotion because she engaged in protected activity. The trial court erred in granting Davis’ motion for directed verdict and abused its discretion in alternatively granting a new trial.

***

To find that the County failed to present any evidence showing a non-discriminatory reason for Davis's lack of promotion, the trial court's order relied on [Miami-Dade Fire Chief MDFR Fire Chief Herminio] Lorenzo’s inability to remember his reasons for not promoting Davis. Such reliance is misplaced where, viewing the evidence in the light most favorable to the County, a reasonable inference can be drawn that the County's decision was based on legitimate, non-discriminatory, non-retaliatory reasons i.e., overages and an agreement between the County and the union prohibited Chief Lorenzo from filling the two ‘vacant’ positions. We also note that Chief Lorenzo testified that the only criteria he used to make CFO promotions was to go ‘straight down the list,’ and that he never took race into consideration. Davis’ own testimony on cross-examination allowed for the reasonable inference that Chief Lorenzo simply went ‘straight down the list’ where she acknowledged that, from 2005 to 2009, he had promoted Blacks, Hispanics, women, and active members of the PFA.”  [Footnote 3.]  


**Legal Lessons Learned: Jury’s verdict is upheld.**

Note: Trial judge who ordered new trial thought the jury had been “deceived” because a FD report had not been provided to plaintiff’s counsel prior to trail.

“The [trial judge’s] order also concluded the jury was ‘deceived as to the force and credibility of the evidence or [] influenced by considerations outside the record,’ a reference to a small portion of testimony stricken by the trial court. More specifically, the trial court struck testimony from Robin Duran (a division chief and then-Deputy Chief to Alfredo Suarez) stating that there were only seventy-seven 'required’ CFO positions for the 2009-10 promotional cycle. Duran further explained that she prepared a report reaching the same number of available CFO positions—seventy-seven. Because the report was never provided to plaintiff’s counsel, the trial court struck the testimony as a ‘blatant, willful violation of discovery.’ *** The trial court's finding that the jury was influenced by the stricken testimony is not supported by the evidence. We also note that the trial court gave a curative instruction as requested by Davis, and that Davis did not make a contemporaneous motion for mistrial.  

[Black v. Cohen, 246 So. 3d 379, 384 (Fla. 4th DCA 2018) (noting: ‘[T]he Florida Supreme Court has held that a trial court may not grant a new trial based upon objections to attorney misconduct which were sustained, but for which no motion for mistrial was requested.’). The testimony in question was at most cumulative, did not advance the County's theory beyond that which had already been established.”  [Footnote 4.]
MI: CITY OF WARREN – “DIVERSITY AND INCLUSION COORDINATOR” RESIGNED - LAWSUIT MAY PROCEED

On Aug. 19, 2020, in Gregory Murray v. City of Warren, U.S. District Court Judge Gershwin A. Drain, Eastern District of Michigan (Southern Division) denied the city’s motion to dismiss portions of the lawsuit.

“Plaintiff also claims similarly situated employees who are not in a protected class were treated more favorably than he was where his efforts to perform his job duties were thwarted forcing his resignation while his counterparts were able to retain their positions even after engaging in illegal discrimination, which had been reported to Defendants. Additionally, Defendant City's police commissioner allegedly called Plaintiff a racial slur and prevented Plaintiff, with Defendant Fouts' full support, from investigating past incidents of racial discrimination and civil rights violations within the police department. Accordingly, Plaintiff has stated a viable race discrimination claim under both Title VII and the [Michigan statute] ELCRA.”

https://casetext.com/case/murray-v-city-of-warren-1

Legal Lessons Learned: The lawsuit will now proceed to pre-trial discovery. The alleged comments are unacceptable in any workplace.

8-18

PA: REVERSE DISCRIMINATION NOT PROVED - WHITE BATTALION CHIEF & CAPTAIN LAWSUIT DISMISSED


“Plaintiffs offer no analysis of statistical significance whatsoever with regard to the record evidence of exam results and promotions. That failure alone is enough to grant the City's Motion on plaintiffs' disparate impact claim. *** Finally, courts have rejected alleged Equal Protection violations based on an employer's ‘reliance on various subjective criteria during the promotional process.’ Baldwin v. Gramiccioni, No. 16-1675, 2019 WL 2281580, at*16 (D.N.J. May 29, 2019). Indeed, courts have held that '[s]ubjective promotion criteria are not discriminatory per se.' Beckett v. Dep’t of Corrections, 981 F. Supp. 319, 327 (D. Del. 1997) (citing Shealy v. City of Albany, 89 F.3d 804, 805 (11th Cir. 1996)).”


Legal Lessons Learned: Lack of statistical significance in exams and promotions led to dismissal of this lawsuit.
CT: FF ALLEGED RACE DISCRIM – TWO INCIDNTS - NO ALLEGATION RACE “PERMEATED OVERALL WORKING ENVIRONMENT”

On June 29, 2020, in Tony Milledge v. City of Hartford, et al., U.S. District Court Judge Jeffery Alker Meyer, District of Connecticut, dismissed the lawsuit by African American firefighter with 20 years on Hartford FD. He filed complaint alleging two incidents, but lacking specific on how these incidents were related to race. The Court wrote: “What is lacking, however, are facts to suggest that any of the alleged abuse was because of Milledge's race. Milledge does not recite any statements by the two supervisors to suggest that they picked on him because of his race. Nor does Milledge allege facts to suggest that race considerations generally permeated the overall working environment at the fire department—for example, that supervisors at the fire department made any remarks or engaged in any conduct reflecting race-based animus or stereotypical assumptions about race.” The Court will allow him to file an amended complaint: “If Milledge chooses to file an amended complaint, the amended complaint should not only state additional facts to support an inference of discriminatory motive but also to show that the alleged acts of abuse created a hostile work environment.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZjxlcnGgF4KmxTbsHmdpUnhrKX1xZ8%2F1BaT4X1Cm7%2Fj

Legal Lesson Learned: FDs can help avoid litigation by conduct prompt, thorough internal investigations of all complaints (after receipt of written complaint).

8-16


On June 26, 2020, in Gordon Springs v. City of New York, et al., U.S. District Court Judge Alvin K. Hellerstein granted the City’s motion to dismiss. “Springs fails to adequately plead a hostile work environment, because the FAC [First Amended Complaint] does not sufficiently claim a causal connection between Springs's protected characteristics and most of the contested acts and, as to the remaining acts, the alleged acts of hostility do not rise above the level of ‘petty slight or trivial inconvenience.’

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZu9WSCqieY3u1gfnWEwDVajGcV1Qbmc97gDjPt%2BB6d9C

Legal Lessons Learned: To state a claim for a hostile work the plaintiff must allege "that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of ... employment and create an abusive working environment."

Note: Read Judge’s comments about the “pork incident.”
“The alleged pork incident is equally if not more trivial. The full extent of that allegation is that unidentified firefighters in Engine 67 ‘cooked a meal and made hamburgers in the same pan used to cook bacon’ even though they had ‘full knowledge’ that Springs is Muslim and therefore ‘unable to eat pork or cook with pork.’ FAC at ¶¶ 48-50. That's it. Springs does not say whether this was the only pan in Engine 67; whether any firefighters made comments to accompany their cooking with pork suggestive of animus; whether Springs, in the moment, said anything to his coworkers to remind them of his dietary restrictions, see id. at ¶ 49 (noting that Springs had advised ‘all firefighters’ that he was Muslim ‘prior to this meal’) (emphasis added); or even whether Springs was present at the time the cooking took place. But even stretching to its limit the duty to read the FAC in the light that is most favorable to Springs, it seems that at worst he would have been required to clean this pan in order to cook in it himself, or perhaps would have been required to notify a superior in Engine 67 that, in the future, his meals would need to be prepared separately. Again, this incident may have been insensitive, but it did not impose anything more than a petty slight or inconvenience.”

8-15

**TX: FEMALE, AFRICAN AMERICAN FF LAWSUIT FOR HOSTILE WORK ATMOSPHER – NOT FREQUENT, PERVERSIVE**

On June 9, 2020, in Carla West v. City of Houston, Texas, the U.S. Court of Appeals for the Fifth Circuit (New Orleans) held (3 to 0) that the U.S. District Court Judge properly granted summary judgment to the City. The Court wrote: “West seeks to impose Title VII liability on her employer because her coworkers passed gas at the dinner table; infrequently slept in their underwear at the station; made the occasional racially insensitive joke; and brought adult magazines to the station. That is not severe or humiliating under the governing standards.” [http://www.ca5.uscourts.gov/opinions/pub/19/19-20294-CV0.pdf](http://www.ca5.uscourts.gov/opinions/pub/19/19-20294-CV0.pdf)

Legal Lessons Learned: Hostile work atmosphere requires proof of “severe or humiliating” atmosphere.


8-14

On April 17, 2020, in George Ful Ninying v. New York City Fire Department, the U.S. Court of Appeals for the Second Circuit (New York City), held (3 to 0) in a Summary Order that the U.S. District Court judge had properly granted summary judgment to the City. Plaintiff filed suit pro se (represented himself without an attorney in both trial court and on appeal). Court of Appeals agreed with District Court judge, that plaintiff failed to allege facts to show that he would have been promoted in 2015, “but for” his having filed an EEOC complaint in 2012, and there was alleged facts support his claim of race discrimination because his wife is African-American and he is “Black Minority.”

“In order to plead a prima facie claim of retaliation under both Title VII and the ADEA, a plaintiff must allege that (1) he participated in a protected activity; (2) the employer knew of his protected activity; (3) he was subjected to an adverse employment action; and (4) there was a causal connection between the participation in the protected activity and the adverse employment action…. Here, too, Ninying’s conclusory allegation fails to state a retaliation claim under either the ADEA or Title VII, both of which required him to allege that his protected activity was the but-for cause of the adverse employment action. See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 US. 338, 360, 362–63 (2013) (holding that unlike other Title VII claims, Title VII retaliation claims must be proved according to ‘traditional principles’ of but-for causation). Nor did Ninying’s allegation that he was retaliated against in 2015 for filing a 2012 EEOC complaint allege the requisite causation.”

http://www.ca2.uscourts.gov/decisions/isysquery/83382276-eb3d-4d56-b5fe-4596b6d0f64b/1/doc/19-1265_so.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/83382276-eb3d-4d56-b5fe-4596b6d0f64b/1/hilite/

Legal Lessons Learned: Plaintiff also alleged race discrimination based on his wife’s race, and that he is a “Black Minority.”

Note: Court wrote: “Ninying asserts that he was discriminated against because his wife is African American and he is a ‘Black Minority,’ but he does not allege any facts relating his protected status to his failure to be promoted…. And though Ninying alleges that he is fluent in French because of his national origin, he has neither identified his national origin nor alleged that he faced discrimination because of it.”

8-13

FL: FIRED LT. SETTLEMENT – REHIRED, BUT NOT TO TRAINING DIV. – RETIREMENT $ NOT REPAYED – $36,663 JURY VERDICT SET ASIDE

On March 27, 2020, in Orange County, FL v. Stacey Mclean, the District Court of Appeal of the State of Florida, Fifth District, held (3 to 0) that trial judge should have granted county’s motion for a directed verdict and set aside the jury’s verdict. Internal investigation in 2013 of improper recording hours worked – 56 disciplined; in 2014, County fired 3 African-American males, including Plaintiff (Lt. in Training Division). He sued in 2015 for race discrimination; County settled lawsuit, returned him to work [but no openings in Training Division] and paid him back wages. State Board of Administration [retirement fund] ordered him to re-pay retirement funds he withdrew in
2014; he refused and was forced to retire or FD would be dropped from the retirement fund. He sued and jury awarded him $36,663.

“Here, the trial evidence established that the County met its burden. The County showed that it had a legitimate reason to comply with the SBA’s order when it required McLean to retire after he failed to reimburse his FRS account so as to not jeopardize its own continued participation in the FRS. Second, the County demonstrated that there were no vacancies or openings in the Training Division at the time McLean was reinstated.

***

McLean’s explanation that he expected to return to the Training Division, despite the County having no obligation under the settlement agreement to do so, without more, did not rise to an evidentiary level to allow the jury to decide whether the County’s reason here was pretextual.”

https://www.5dca.org/content/download/632688/7189187/file/183494_DC13_03272020_081652_i.pdf

Legal Lesson Learned: When negotiating a return-to-work agreement, consider including a provision regarding the position to which the employee will be returning.

8-12

U.S. SUPREME COURT: BLACK-OWNED MEDIA COMPANY DENIED CONTRACT - MUST PROVE “BUT FOR” RACE WOULD HAVE RECEIVED

On March 23, 2020, in Comcast Corp. v. National Association Of African American-Owned Media, et al., the U.S. Supreme Court unanimously held (9 to 0) that the plaintiff, Entertainment Studios, must prove that race was the but-for cause of its injury—in other words, that Comcast would have acted differently if Entertainment Studios were not African-American owned.

In opinion by Justice Neil Gorsuch, the Court held:

“All the traditional tools of statutory interpretation persuade us that §1981 follows the usual rules, not any exception. To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right…. The Ninth Circuit has yet to consider that question because it assessed ESN’s pleadings under a different and mistaken test. To allow that court the chance to determine the sufficiency of ESN’s pleadings under the correct legal rule in the first instance, we vacate the judgment of the court of ap-peals and remand the case for further proceedings consistent with this opinion.” https://www.supremecourt.gov/opinions/19pdf/18-1171_4425.pdf

Legal Lessons Learned: Important decision on race discrimination.

MD: TWO AFRICAN AMERICANS PROMOTED B/C – BUT LIST HAD EXPIRED - WHITE CAPTAIN PASSED OVER – LAWSUIT PROCEED

On March 3, 2020, in Donald Dziwulski v. Mayor & City Council of Baltimore, U.S. Magistrate Judge Deborah L. Boardman, District of Maryland (Northern Division) denied the City’s motion for summary judgment concerning Dziwulski's claim for race discrimination based on failure to promote and his retaliation claim based on the reclassification of Carter's position.

“Defendant argues that, throughout the entire process, [then Fire Chief James] Clack was planning to promote Claggett and Stokes into the two new positions. They were ranked first and second on the Eligibles List in effect at the time. To make their promotions possible despite the Board's failure to act on May 8, 2013, Clack promoted them on May 13, 2013, before the Board approved the position…. [But] by the time Clack acted on May 13, 2013, the Eligibles List that included Claggett and Stokes had expired. *** On the record before me, Defendant has offered a legitimate, non-discriminatory reason for each of its employment decisions when considered individually. Thus, a reasonable jury, weighing the facts on the record before me as to each employment decision one at a time, could find that no race-based discrimination occurred. Nonetheless, considering the combined effect of these decisions, which collectively ‘undermine the credibility of the employer's stated reasons,’ Captain Dziwulski has identified sufficient evidence of pretext to survive Defendant's Motion for Summary Judgment. ***

Nonetheless, considering the combined effect of these decisions, which collectively ‘undermine the credibility of the employer's stated reasons,’ Captain Dziwulski has identified sufficient evidence of pretext to survive Defendant's Motion for Summary Judgment. *** Most significantly, over the course of several months, Captain Dziwulski repeatedly was not selected for promotions for which he was eligible, even though he was ranked first on the Eligibles List in effect at the time. Each time, either African Americans were selected instead of him or the position was left open. Considering these events cumulatively, a genuine dispute exists regarding whether the Department's reasons each time were legitimate and non-discriminatory or pretext.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZtTeqjzzEnlP0E9gnOJzg5Beu%2B8e3Ta9mPaMkCNr0Gg4

Legal Lessons Learned: Making promotions from expired lists can lead to litigation.

8-10

GA: KNEE SURGERY – FF NOT ALLOWED BACK TO WORK – LAWSUIT DISMISSED SINCE DIDN’T FILE IN 90 DAYS OF EEOC LETTER

On Jan. 23, 2020, in Derek Lee Colson v. City of Thomasville, et al., U.S. District Court Senior Judge Hugh Lawson, U.S. District Court for Middle District of Georgia, Valdosta Division, granted defendants motion for summary judgment and dismissed his lawsuit for failure to file within 90 days of the EEOC’s Right To Sue letter.

“The undisputed evidence is that the EEOC mailed a Dismissal and Notice of Rights to Plaintiff on October 26, 2017. (Doc. 23-3). There is no evidence in the record beyond Plaintiff’s unsupported statement that the original notice was not delivered. Accepting this statement alone without further explanation would permit Plaintiff to enjoy a ‘manipulable, open-ended time extension,’ which the Eleventh Circuit has opined would
‘render the statutory minimum meaningless.’ *** Plaintiff did not file his Complaint until August 21, 2018 – 296 later. Plaintiff’s Complaint is therefore time-barred.”  
https://ecf.gamd.uscourts.gov/cgi-bin/show_public_doc?2018-00132-29-7-cv

Legal Lessoned Learned: Title VII requires lawsuit to be filed within 90 days of EEOC “Right To Sue” letter; if don’t have an attorney, need to make sure EEOC has your correct address, and periodically check on status of EEOC investigation.

8-9

**AL: CAPT. (AFRICAN AMERICAN) CLAIMED FIRE CHIEF (ALSO AFRICAN AMERICAN) PROMOTED SAME RACE OF PRIOR PERSON IN POSITION**


“Selma’s proffered reasons for failing to recommend or promote Plaintiff to a ‘Chief-level’ position include that applicants who received recommendations and promotions had been with the Fire Department longer than Plaintiff and had fewer disciplinary infractions… Selma has presented evidence that each candidate who received a ‘Chief-level’ recommendation and promotion was with the Fire Department longer than Plaintiff and/or had fewer disciplinary infractions than Plaintiff. Seniority and disciplinary history are legitimate non-discriminatory reasons for Stephens’ recommendations for promotion.”


Legal Lessons Learned: Plaintiff failed to prove that the Mayor or other city officials knew about or concurred in the alleged “demographic promotion process.”

8-8

**GA: APPLICANT (AFRICAN AMERICAN) FOR FIRE CHIEF NOT SELECTED – IN HOUSE CANDIDATE MORE QUALIFIED, EVEN IF NO DEGREE**

On Oct. 4, 2019, in Roderick Jolivette v. City of Americus, Georgia, the U.S. Court of Appeals for 11th Circuit (Atlanta) held 3 to 0 (unpublished opinion), upheld the U.S. District Court judge’s decision granting summary judgment to the City.

“Although Jolivette possessed a bachelor’s degree, as required in the job posting, the City policies weighed equally candidates who possessed an “equivalent combination of education, training, and experience.” Dee Jones, the human resources director for the City, testified that [Roger] Bivins qualified for the position of Fire Chief ‘because of the totality’ of his skills, experience, and education, as provided for in the job posting
and ‘our job description.’ Jolivette does not dispute that Bivins possessed skills, experience, and abilities that ‘substitute[d] for a lack of a college degree.’"

Legal Lessons Learned: Using panel of experienced senior officers from other FDs to rate candidates for Fire Chief is a great process.

8-7

**LA: BLACK EMS CAPT. – NITROGLYCERIN WAS FOR MOUTH, NOT CHEST – SUSPENSION / REMEDIATION PROPER - NOT RACE / GENDER**

On Sept. 17, 2019, in Deborah Mills v. City of Shreveport, U.S. District Court Judge Terry A. Doughty, U.S. District Court of Louisiana, Western District, Shreveport Division, dismissed her claim of “hostile work atmosphere.” He had previously dismissed her race and gender discrimination claims.

“While Mills may subjectively believe that she has been treated differently and more harshly because of her race and/or gender, neither her subjective belief or that of others is enough to present this case to a jury. The Court finds that Mills has presented no genuine issue of material fact regarding whether she was subjected to harassment based on race or gender, and therefore she has failed to present a *prima facie* case for a hostile work environment under Title VII. Therefore, the Court GRANTS the City’s Motion for Summary Judgment on this remaining claim.”

On June 21, 2019, her other claims of race and gender discrimination were dismissed:

Legal Lessons Learned: EMS protocols must be followed, and suspension / remediation training is an appropriate corrective action. [Also filed, Chap. 13, EMS.]

8-6

**MO: BLACK FF SCORED 32nd CAPTAIN’S TEST – RESIGNED 1-YR LATER & RETIRED – NOT “CONSTRUCTIVE DISCHARGE”**

On Sept. 6, 2019, in Travis Yeargans v. City of Kansas City, Senior U.S. District Court Judge Ortrie D. Smith, U.S. District Court for Western District of Missouri, granted the City’s motion for summary judgment on the “constructive discharge” claim. The lawsuit alleging other racial discrimination claims may now proceed to trial.

Senior Judge Smith wrote:
Moreover, Plaintiff admits he did not discuss his reasons for leaving the KCFD with Defendant, and he did not complain to Defendant that he was the victim of discrimination. Doc. #36-5, at 1-2. These admissions are fatal to his constructive discharge claim. See, e.g., Anda, 517 F.3d at 535; Davison, 121 F. App’x at 672; Williams v. City of Kan. City, 223 F.3d 749, 754 (8th Cir. 2000) (finding the plaintiff did not give the city an opportunity to address her concerns, and therefore, the Court could not say resignation was the plaintiff’s only plausible alternative); Knowles v. Citicorp Mortg., Inc., 142 F.3d 1082, 1086 (8th Cir. 1998) (citations omitted).

In addition, Plaintiff does not explain why he left his employment in April 2014 when he received his oral examination scores in November 2012, and the promotional list was published in December 2012. Plaintiff does not demonstrate how his working conditions became ‘so intolerable’ during that timeframe. In fact, Plaintiff points to nothing specific that occurred during that timeframe that rendered his working conditions so intolerable. Instead, the passage of more than a year between the alleged discriminatory act(s) and Plaintiff's decision to leave his employment does not support his contention that his working conditions were so intolerable he felt he had no choice but to quit.”

Legal Lessons Learned: The promotion process used by Kansas City was well constructed and well documented. If a firefighter believes that a promotion process was improperly conducted, or racially discriminatory, promptly file an internal complaint so the matter can be investigated, or file an EEOC charge: “Time Limits For Filing A Charge: The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis.

8-5

U.S. SUP. CT: MURDER DEFENDANT GETS NEW TRIAL (HIS 7TH) - PROSECUTOR REPEATEDLY REMOVED BLACKS FROM JURY

On June 21, 2019, in Flowers v. Mississippi, the U.S. Supreme Court (7 to 2), overturned the defendant’s conviction of murdering four people, and remand the case for re-trial (he has previously been tried six times for the murders).

Justice Brett Kavanaugh wrote majority opinion:

“Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the
State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.”

Legal Lessons Learned: The U.S. Supreme Court will not allow prosecutors to use peremptory strikes to unfairly exclude black jurors.

8-4

**FL: DOCTOR COMPLAINED ABOUT MEDICAL CLEARANCE OF FF – NOT PROTECTED FIRST AMENDMENT SPEECH**

On March 1, 2019, in Nancy King v. Board of County Commissioners, Polk County, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that U.S. District Court judge properly granted summary judgment to Polk County. “She did not engage in speech protected by the First Amendment, however, because she spoke as an employee and not as a private citizen.”

Legal Lessons Learned: Public employees have limited First Amendment rights; reverse discrimination not proven.

8-3

**MI: DETROIT – CITY WIDE LAYOFFS - 11 FF LAWSUIT AGAINST UNION DISMISSED, FOLLOWED CBA**


“Plaintiffs have no direct evidence of race discrimination. In opposing the Union's motion, Plaintiffs have not presented any statistical evidence to this Court.” The Judge, however, did not require Plaintiffs to reimburse Union for its attorney fees: “The Court also concludes that the Union has not shown that an award of attorney fees against the Plaintiffs themselves is warranted in this case. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (A district court may, in its discretion, award attorney fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith). Such awards against Title VII plaintiffs are rare, and this Court does not believe one is warranted here.”
Legal Lessons Learned: Plaintiffs failed to establish Title VII liability for City or the Local.

**MD:** AIRPORT HIRED LATINO AS FIRE CHIEF - AFRICAN-AMERICAN’S LAWSUIT MAY PROCEED

On Jan. 19, 2018, in Gregory C. Lawrence v. Maryland Aviation Administration, U.S. District Court for District of Maryland, Judge Richard D. Bennett denied the motion to dismiss filed by the Maryland Aviation Administration.

“Plaintiff alleges that despite his experience and "stellar qualifications" for the position, he was not hired; instead, plaintiff alleges, "[t]he person hired was a Latino male, substantially less qualified for the position than Mr. Lawrence."

https://www.leagle.com/decision/infdco20161011978

Legal Lessons Learned: Title VII claim may now proceed to pre-trial discovery.

**NY:** FDNY’s FORMER EEOC OFFICER SUES FOR RACE DISCRIMINATION – LAWSUIT MAY PROCEED

On Jan. 2, 2018, in Lyndelle T. Phillips, Esq. v. The City of New York, et al., U.S. District Court Senior Judge Jack B. Weinstein, held that the City’s motion to dismiss is denied and her lawsuit may proceed.

“After observing plaintiff during her extended examination by the court, defendants' motion for summary judgment on plaintiffs Section 1981 claim is denied. A jury could find her to be a credible witness who took her job at the FDNY seriously and performed satisfactorily. Discrimination, and not poor job performance, a jury could conclude, was the reason for her termination by the FDNY.

file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/XO250S7T/Phillips-FDNY.pdf

Legal Lessons Learned: The lawsuit may proceed. The judge referenced the Vulcan Society case.

Note: In March, 2014, the City settled the lawsuit with the Vulcan Society for $98 million.

FL: FDNY CHANGED GROOMING POLICY – REQUIRES CLEAN SHAVE – NOW ON APPEAL – JACKSONVILLE FF LAWSUIT


Judge Weinstein’s decision:

“Defendants admit that no heightened safety risk to firefighters or the public was presented by the accommodation previously in effect. Two and a half years passed without incident, and Plaintiffs continued to perform their jobs satisfactorily. The FDNY’s decision to abandon the prior accommodation was not based on any actual safety risks to firefighters or the public. Rather, driving the calculus was bureaucracy. Defendants cite no case law indicating that such bureaucratic considerations are a viable undue hardship defense; the court declines to so find.” [https://casetext.com/case/bey-v-city-of-ny-7](https://casetext.com/case/bey-v-city-of-ny-7)

Legal Lesson Learned: The FDNY case will now be decided by the U.S. Court of Appeals for the Second Circuit. The Jacksonville FD case will proceed to pre-trial discovery.

AL: BATTALION CHIEF INJURED NECK IN OFF DUTY MVA – AFTER LIGHT DUTY PERIOD, ORDERED BACK TO 24-HRS – NO ADA VIOL.

On Oct. 2, 2020, in Jay Hawthorne v. City of Prattville, U.S. District Court Judge R. Austin Huffaker, Jr., Northern District of Alabama, granted the City’s motion for summary judgment. Here’s the timeline after the March 31, 2017
MA: Battalion Chief granted light duty (8-hour clerical) from Oct. 23, 2017 until medically cleared back to work on May 2, 2018. That day he was re-injured in quarterly physical fitness testing; returned to work May 20, 2018 (15-pound lifting restriction), and City put him back to 24-hour shift; he was denied 8-hour shift and given his continuing physical limitations, on Aug. 15, 2018 he was removed from active service, to go on worker's comp (retired Sept. 17, 2019).

“[A]n employer is not obligated to ‘bump’ another employee from a position to accommodate a disabled employee. Lucas, 257 F.3d at 1256. Nor is an employer required to create a new position for an employee. Boyle v. City of Pell City, 866 F.3d 1280, 1289 (11th Cir. 2017); Sutton v. Lader, 185 F.3d 1203, 1210-11 (11th Cir. 1999) (an employer ‘is under no obligation to hire an employee for a non-existent job,’ nor is it required to create a light-duty position for a disabled employee).

***

The Court concludes that working a 24-hour shift is an essential function of the battalion chief position within the City's fire department. As Hawthorne admits, the fire department required a battalion chief to be on-duty at all times, and all battalion chiefs and most other fire department personnel worked 24-hour shifts. As such, for Hawthorne to work only a daily 8-hour shift, compared to the 24-hour shifts required of all the other battalion chiefs, there would be a disruption of the shift rotation of the other battalion chiefs who would have to cover Hawthorne's overnight hours in addition to their own, or alternatively, the City would have had to hire an additional battalion chief.”

https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZtupy9a3EvXpG9ydLD29CKGnkdsXWzWbFQljc8xBD5GU

**Legal Lesson Learned:** Under ADA, an employee’s inability to perform the job duties serves as a legitimate, non-discriminatory reason for termination.

9-15

**MA: FF RETIRED DISABILITY – CFH / HEARING LOSS – SEEKS JOB BACK WITH “AGE-ADJUSTED” HEARING TEST – TRIAL JUDGE TO REVIEW**

On Sept. 29, 2020, in John Rodrigues v. Public Employee Retirement Administration Commission, the Appeals Court of Massachusetts held (3 to 0) that firefighter’s reinstatement was properly denied because of his heart condition, but case remanded to trial court to decide if the Commonwealth’s Human Resources Division [HRD] requirement that FF must past the hearing standard for new hires, not “age-adjusted” standards, is lawful.

In addition to his claims for reinstatement or damages, Rodrigues also brought claims seeking declaratory relief -- in particular, count one seeks, among other things, a determination that PERAC should apply age-adjusted, in-service health and fitness standards in determining restoration to service under c. 32, § 8, and count two specifically seeks a declaration that PERAC violated G. L. c. 31, § 61A, by failing to employ such age-adjusted hearing standards. These claims should not have been dismissed. They raise primarily questions of law that could well arise in any of Rodrigues's future reinstatement evaluations (which under G. L. c. 32, § 8 [1] [a], are to occur at least every three years), not to mention those of other firefighters and police officers on disability retirement. The legal questions implicate the requirements of the two above-mentioned statutes,
and how those statutes interrelate. Answering them also will require analysis of a 2016 regulation issued by PERAC, discussed infra. The issue is appropriate for declaratory relief.”


Legal Lessons Learned: Will be interesting to see if the Trial Court, and the Court of Appeals, eventually holds that hearing standards for firefighters and police officers seeking reinstatement can be “age adjusted.”

Note: See OSHA Guidance: 1910.95 App F - Calculations and application of age corrections to audiograms:

“In determining whether a standard threshold shift has occurred, allowance may be made for the contribution of aging to the change in hearing level by adjusting the most recent audiogram. If the employer chooses to adjust the audiogram, the employer shall follow the procedure described below. This procedure and the age correction tables were developed by the National Institute for Occupational Safety and Health in the criteria document entitled ‘Criteria for a Recommended Standard . . . Occupational Exposure to Noise,’ ((HSM)-11001).”


See also: IAFF’s “Fire Department Guide to Implementing NFPA 1582,”

See also EEOC Guidance: “Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act.”

9-14

LA: FF HEARING LOSS – REIMBURSED FOR HEARING AIDS – BUT NO ENTITLED TO DISABILITY PAYMENTS – NOT “SINGLE ACCIDENT”

On Sept. 22, 2020, in Glenn Hankel v. Jefferson Parish Fire Department, the Fifth Circuit Court of Appeal of State of Louisiana, held (2 to 1) that while the fire department reimbursed the retired firefighter for cost of hearing aids based on LA firefighter statutory presumption statute, he was not entitled to permanent partial disability payments [which would be 66 2/3rd weekly wages, up to 100 weeks] since the LA statute only applies to disabilities caused by a single accident.

“In the instant case, there is no dispute that Mr. Hankel's hearing loss was gradual and not the result of a single accident or event. The plain language of La. R.S. 23:1221(4)(p) only provides benefits for permanent hearing losses resulting solely from a single traumatic accident. Accordingly, after a de novo review of the record, we find that there is no genuine issue as to material fact and that the JFPD is entitled to judgment as a matter of law. Thus, we find no error in the trial court's ruling that Mr. Hankel is not entitled to permanent partial disability benefits for his hearing loss. 

Legal Lessons Learned: This case may be appealed to the Louisiana Supreme Court; Dissenting judge references prior Louisiana Supreme Court decision in *Arrant v Graphic Packaging Int'l, Inc.*, 13-2878, 169 So. 3d 296, 305 (La. 5/5/15). [https://law.justia.com/cases/louisiana/supreme-court/2015/2013-c-2878.html](https://law.justia.com/cases/louisiana/supreme-court/2015/2013-c-2878.html)

Note: See Louisiana Firefighter Statutory Presumption For Hearing Loss

La. R.S. 33:2581.1 provides:

A. Any loss of hearing which is ten percent greater than that of the affected employee's comparable age group in the general population and which develops during employment in the classified fire service in the state of Louisiana shall, for purposes of this Section only, be classified as a disease or infirmity connected with employment. The employee affected shall be entitled to medical benefits including hearing prosthesis as granted by the laws of the state of Louisiana to which one suffering an occupational disease is entitled, regardless of whether the fireman is on duty at the time he is stricken with the loss of hearing. Such loss of hearing shall be presumed to have developed during employment and shall be presumed to have been caused by or to have resulted from the nature of the work performed whenever same is manifested at any time after the first five years of employment in such classified service. This presumption shall be rebuttable by evidence meeting judicial standards and shall be extended to an employee following termination of service for a period of twenty-four months.

**9-13**

**NY: CIVILIAN FIRE PROTECTION INSPECTOR – ASTHMA, OFFICE ONLY WORK - NOT PROMOTED FIELD POSITION**

On July 18, 2020, in *John Skariah v. The City of New York, et al.*, 2020 NY Slip Op 31890(U), Judge Lyle E. Frank, Supreme Court of State of New York (County Part 52) granted the City’s motion for summary judgment. Plaintiff has been civilian employee with FDNY since 1992, and was promoted in 1997 to Associate Fire Protection Inspector I. Plaintiff is from India and in 1998 he was given a raise and promoted from Associate Fire Inspector I to the position of Deputy Chief Inspector as part of a 1998 Equal Employment Opportunity Commission (‘EEOC’) Settlement Agreement. “Plaintiff submitted a doctor's note to FDNY stating ‘Patient is under my care for asthma. Due to his condition it is advisable for him to work in the office and not in the field. *** Even if plaintiff could establish a prima facie claim, in response, defendants have proffered a legitimate nondiscriminatory reason for why plaintiff was not promoted, that is the disability he suffered for why a reasonable accommodation was required.” [https://cases.justia.com/new-york/other-courts/2020-2020-ny-slip-op-31890-u.pdf?ts=1592946781](https://cases.justia.com/new-york/other-courts/2020-2020-ny-slip-op-31890-u.pdf?ts=1592946781)

Legal Lessons Learned: When employee advises employer they have a disability – in this case Asma requiring office position only, the employee’s lawsuit for not being promoted to positions requiring fieldwork will be dismissed.

**9-12** [Also filed: Chap. 10 & 15]
PA: FF PANIC ATTACK ON DUTY – PTSD, MEDICATION – NO LONGER QUALIFIED AS FF – TERMINATION NOT VIOL. ADA

On April 17, 2020, in Robert Carpenter v. York Area United Fire And Rescue, U.S. District Court Judge Christopher C. Conner, Chief Judge, Middle District of Pennsylvania, granted the FD’s motion for summary judgment. The Court held that the firefighter was not a “qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation,” and indefinite leave of absence was not a reasonable accommodation; “there must be some expectation that the employee could perform his essential job functions in the ‘near future’ following the requested leave.

“[Fire Department] argues that Carpenter is not a qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation. We agree.”

Legal Lessons Learned: FF on leave and undergoing treatment, who desires to get back to the job, needs to stay in communication with FD. FMLA also addressed (see below).

Note: Court also held that the FF was not entitle the FMLA leave. “In a letter dated October 11, 2017, YAUFR denied Carpenter’s FMLA leave request… YAUFR explained that, although it was a covered employer under the FMLA, it did not employ the requisite number of people for Carpenter to be considered an ‘eligible employee’ under FMLA regulations. *** To qualify as an ‘eligible employee,’ the employee must be ‘employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.’ 29 C.F.R. § 825.110(a)(3); see 29 U.S.C. § 2611(2)(B)(ii). YAUFR avers, and Carpenter concedes, that YAUFR has never employed 50 or more people.”

9-11

EEOC: COVID19 PANDEMIC MEETS THE “DIRECT THREAT” STANDARD - MAY TEST EMPLOYEES – SOME FDs NOW SCREENING EVERY SHIFT

On March 21, 2020, the federal Equal Employment Opportunity Commission issued updated guidance:

“The EEOC is updating this 2009 publication to address its application to coronavirus disease 2019 (COVID-19). Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace. This update retains the principles from the 2009 document but incorporates new information to respond to current employer questions. For readers’ ease the COVID-19 updates are all in bold.”
Legal Lessons Learned: Fire & EMS departments, with the concurrence of their Medical Director, should consider taking the temperature of crews on each shift. Note: The author of this Newsletter serves on the SW Ohio EMS Protocol Committee; two UC Health physicians on the committee sent out an update on March 27, 2019, including the following:

“Symptomatic Prehospital Provider Many Departments have already initiated screening of employees at the start of every shift. Providers with fever (100.0 or higher) and/or symptoms should not work. Symptomatic providers are a priority for COVID-19 testing. The Department’s Employee Health and/or the provider’s PCP should be able to arrange testing. The UC Health ‘Drive-Through’ testing center may be able to help (open M-F 10-4, must call 41-VIRUS to make appointment). Test results may take 4-5 days.”

9-10

LA: DISPATCHER FIRED - POOR WORK PERFORMANCE – CLAIMED ANXIETY – DIDN’T REQUEST ACCOMODATIONS


“The Court finds Plaintiff has failed to produce competent summary judgment evidence to make out a *prima facie* failure-to-accommodate claim. Plaintiff has not produced evidence to show that the consequential limitations of Plaintiff’s alleged disability were known to Defendant or that Defendant failed to make reasonable accommodations for such limitations. Therefore, Defendant is entitled to judgment as a matter of law dismissing Plaintiff's failure-to-accommodate claim.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZhmmbLojT%2FvpyhULz0lXhVnEOLZ3Ga%2BMf6ctA4VMmca

Legal Lessons Learned: As explained by the Court, “Under the ADA, an employer is only required to accommodate the known limitations of an employee's disability." A *prima facie* case of failure-to-accommodate requires that: ‘(1) the plaintiff is a 'qualified individual with a disability;' (2) the disability and its consequential limitations were 'known' by the covered employer; and (3) the employer failed to make 'reasonable accommodations' for such known limitations.”

9-9

NY: AFRICAN AMERICAN FFs WITH PFB – FDNY NEW POLICY REQUIRED FF TO SHAVE CHIN HAIR - VIOLATES ADA

On Jan. 29, 2020, in Salif Bey, et al. v. City of New York, Senior U.S. District Court Judge Jack B. Weinstein, Eastern District of New York, granted summary judgment to four FF who brought the lawsuit. From Aug. 2015 until Dec. 2017, FDNY allowed 16 FF with PFB to have hair on their chin so long as they passed fit test, but
changed the policy in 2018 to more strictly comply with OSHA requirements. Judge, however, cited OSHA interpretation letter: *Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function.*

“Salik Bey (‘Bey’), Clyde Phillips (‘Phillips’), Steven Seymour (‘Seymour’) and Terrel Joseph (‘Joseph’) (collectively, ‘Plaintiffs’) are African American men who were employed as firefighters by the Fire Department of the City of New York (‘FDNY’ or ‘Department’) when the relevant events began. Amended Complaint (‘Am. Compl.’) ¶ 9, ECF No. 19. They suffer from Pseudofolliculitis Barbae ("PFB")—a physiological condition that causes disfigurement of the skin in the hair-bearing areas of the chin, cheek, and neck. *Id.* at ¶¶ 22-23. *** By a letter dated May 9, 2016, OSHA interpreted the relevant RPS provision as clearing the way for Plaintiffs to maintain facial hair that does not protrude under the respirator seal:

The Respiratory Protection standard, paragraph 29 CFR 1910.134(g)(1)(i)(A), states that respirators shall not be worn when facial hair comes between the sealing surface of the facepiece and the face or that interferes with valve function. *Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function.* Short mustaches, sideburns, and small goatees that are neatly trimmed so that no hair compromises the seal of the respirator usually do not present a hazard, and, therefore, do not violate paragraph 1910.134(g)(1)(i). May 9, 2016 OSHA Interpretative Letter at 2, ECF No. 48-15 (emphasis added). *** On the theory and facts of the ‘failure to accommodate’ and disability discrimination claims under the Americans with Disabilities Act (‘ADA’), Plaintiffs are entitled to summary judgment against Defendants and to reinstatement of the accommodation previously in effect.”


Legal Lessons Learned: The OSHA interpretation letter, not requiring complete shaved face, was very important in this ADA litigation.

9-8

**GA: PARAMEDIC WITH MS – TEACHER / LAB ASSIS. – 3 DAYS SICK, COLLEGE REMOVED FULL SEMESTER – DOJ SetTLEMENT / BOJ BLOG**


“From 2009-2012, in addition to working as a full-time paramedic, Ms. Queen worked evening shifts as a part-time EMT lab assistant at Lanier Technical College, a unit of the Technical College System of Georgia. She loved teaching and hoped to someday become a full-time instructor. One former colleague described Ms. Queen as a ‘superstar’ lab assistant whom ‘students loved.’ But after Ms. Queen took three days of sick leave due to her MS, the college removed her from the teaching schedule for an entire school semester, thus reducing her hours and pay to zero. As alleged by the Justice Department in a complaint filed in federal district court in November 2019, the college’s actions effectively terminated Ms. Queen’s employment on the basis of her disability, in violation of Title I of the ADA.”

Nov. 7, 2019 Settlement Press Release:

“The agreement resolves the Department’s complaint alleging that the college terminated an employee, who has multiple sclerosis, on the basis of her disability after years of service to the college. The complaint further alleges that, after the employee took three days of sick leave one summer, the college removed her from the teaching schedule for an entire school semester, thus reducing her hours and pay to zero, due to her multiple sclerosis.” [https://www.justice.gov/opa/pr/justice-department-settles-college-resolve-disability-discrimination-complaint

Legal Lessons Learned:  U.S. Department of Justice aggressively enforces the ADA, including this lawsuit on behalf of a paramedic and teacher.

9-7

FL:  FIREFIGHTER LATE FOR MANY SHIFTS – CLAIMED DISABILITY – PROPERLY FIRED – ESSENTIAL JOB FUNCTION TO BE ONTIME

On Nov. 13, 2019, in Darrell C. Hartwell v. Richard Spencer, Secretary of U.S. Navy, the U.S. Court of Appeals for 11th Circuit (Atlanta) held (3 to 0) in an unpublished decision, that U.S. District Court properly granted summary judgment to the U.S. Navy.

“Hartwell contends that his medical conditions impair his time management skills and the medication that he takes causes morning drowsiness, making it impossible for him to consistently report for work by 7:00 a.m. The only accommodation he requested was to allow him to come to work up to an hour late without prior notice. A few days before he was fired, Hartwell provided a note from his doctor stating that Hartwell’s condition was permanent, but that his symptoms could be ‘minimized’ ‘with long term individual counseling and medication.’ In other words, with or without the accommodation he requested, Hartwell expected to continue his pattern of frequent tardiness indefinitely. The pivotal issue on appeal, therefore, is whether punctuality is an essential function of the job of a firefighter/EMT. *** We agree with the district court that reporting to work on time was an essential function of Hartwell’s job as a firefighter/EMT. Because Hartwell could not perform this function with or without his requested accommodation, he is not “otherwise qualified” within the meaning of the Rehabilitation Act, and the district court correctly granted the defendant’s motion for summary judgment on this claim. [http://media.ca11.uscourts.gov/opinions/unpub/files/201814488.pdf

Legal Lessons Learned: The Court properly recognized the essential job function of a firefighters – to show up for work on time.
PA: PAINFUL TO SHAVE – POLICE DEPT. REQUIRED MEDICAL CERT. EACH 60 DAYS – LAWSUIT REINSTATED FOR ADA BREACH

On Aug. 8, 2019, in Joseph H. Lewis, Jr. v. University of Pennsylvania, the U.S. Court of Appeals for Third Circuit (Philadelphia), held (3 to 0) that a U.S. District Court incorrectly dismissed his ADA lawsuit. Chief Judge Smith wrote:

“This is an employment discrimination appeal arising out of Plaintiff Joseph Lewis’s previous employment with the University of Pennsylvania Police Department. Lewis suffers from a skin condition, pseudofolliculitis barbae (PFB), which has led to issues giving rise to his discrimination claims. *** Lewis submitted a request for accommodation, requesting to ‘not shave face or neck….’ Penn was then on notice of Lewis’s claimed disability and the fact that he wanted accommodation, such that Penn had a duty to engage with Lewis in good faith. It is not clear that Penn did so. According to Lewis, Penn issued a flat denial without making any effort to communicate with him regarding his needs.

Where there is evidence that the employer did not act in good faith to identify an accommodation, ‘we will not readily decide on summary judgment that accommodation was not possible and the employer’s bad faith could have no effect.’ Taylor, 184 F.3d at 31.”

Legal Lessons Learned: The PD will now have to justify its business reasons for no beards, and its 60-day medical certifications. See Aug. 12, 2019 article on this case:

There has been race discrimination litigation in fire service about not shaving because of this skin condition, pseudo folliculitis barbae (PFB). For example, see 2018 lawsuit by four FDNY firefighters:

See also D.C. Fire Department case: March 25, 2015 article: “Fireman’s Beard Bias Claims Given a Trim,” – “Kennedy says that the discrimination against his race and disability kept him from advancing his firefighting career because of his beard growth, but U.S. District Judge Christopher Cooper dismissed parts of the action Friday after finding that ‘PFB does not constitute a disability under the prevailing interpretation’ of the Americans with Disabilities Act. https://www.courthousenews.com/firemans-beard-bias-claims-given-a-trim/

See also 1993 decision by 11th Circuit involving the Atlanta FD: “The City defends the policy, contending that the respirator masks used by firefighters cannot safely be worn by bearded men. The district court granted summary judgment for the City and the firefighters have appealed. For the reasons set forth below,
we affirm the judgment of the district court.”

9-5

VA: FF With PTSD – MOVED TO DAY SHIFT TEMPORARILY - BUT LATER MOVED BACK TO 24/48 SHIFT - LAWSUIT TO PROCEED

On July 8, 2019, in David Webb v. Chesterfield County, Virginia aka Chesterfield Fire And EMS, U.S. District Court Judge John A. Gibney, Jr. denied the County’s motion to dismiss, finding that the firefighter has alleged sufficient facts to proceed on his claim for failure to accommodate under Americans With Disabilities Act.

“Under the ADA, an employer discriminates against an employee by failing to ‘mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability … unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business[.] 42 USC 12112(b)(5)(A).”

Legal Lessons Learned: PTSD is a real issue in fire service. Studies have found that anywhere between approximately 7 percent and 37 percent of firefighters meet criteria for a current diagnosis of PTSD. “Development of PTSD in Firefighters,” (June 10, 2019), https://www.verywellmind.com/rates-of-ptsd-in-firefighters-2797428

9-4

TX: PARAMEDIC INJURED ANKLE ON ICE COMING TO WORK - OFF 13 DAYS – LATER FIRED FOR MISSING SHIFTS – LAWSUIT DISMISSED


“In this case, plaintiff has not shown that he suffered from a disability under the ADA. In fact, he pleaded that his injury was only temporary… (plaintiff injured his foot on January 13, 2017, wore a boot to stabilize his ankle, and was cleared to return to work on January 26, 2017). In his summary judgment response, he mentions that he has diabetes…. But, even if true, simply having a diagnosis does not amount to proof that one has an impairment under the ADA.”
https://www.leagle.com/decision/infdco20190708957
Legal Lessons Learned: Impairment under ADA must be permanent or long term; even a broken leg does not qualify as a “disability.”

Under ADA, a “disability” is defined as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

9-3

**WI: INJURED ANKLE – GIVEN “LIGHT DUTY” BUT TENNIS SHOES NOT ALLOWED – LAWSUIT MAY PROCEED**

On Feb. 27, 2019, in Keith Daniel v. City of Minneapolis, the Supreme Court of MN held (5 to 2), “To give effect to the plain language of the workers’ compensation act and the human rights act, we hold that an employee can pursue claims under each act because each act provides a distinct cause of action that redresses a discrete type of injury to an employee.” [https://cases.justia.com/minnesota/supreme-court/2019-a17-0141.pdf?ts=1551286256](https://cases.justia.com/minnesota/supreme-court/2019-a17-0141.pdf?ts=1551286256)

Legal Lessons Learned: FD dress policies, including policies on “station shoes” may need to be modified to “reasonably accommodate” a firefighter on light duty for an ankle injury. This case will now go to a jury trial, unless settled.


9-2

**LA: BACK INJURY, RETIRING FF FAILED TO TIMELY FILE FOR DISABILITY BENEFITS**

On Nov. 21, 2018, in Brian Mule v. St. Bernard Parish Fire Department, the Court of Appeal, 4th District held (3 to 0) that Office of Workers Compensation trial judge properly ruled that the employee was not entitled to supplemental benefits:

> "Mr. Mule waited more than seven years after this May 22, 2009 injury to pursue his claim for indemnity benefits. The OWC, having reviewed the record, exhibits and listening to the testimony of Mr. Mule and Ms. Bradbury, held that Mr. Mule did not establish that he was lulled into not filing a claim within the prescriptive period under the totality of the circumstances.” [https://cases.justia.com/louisiana/fourth-circuit-court-of-appeal/2018-2018-ca-0507.pdf?ts=1542839104](https://cases.justia.com/louisiana/fourth-circuit-court-of-appeal/2018-2018-ca-0507.pdf?ts=1542839104)

Legal Lessons Learned: Fire & EMS personnel, injured on the job and facing disability retirement, should consult with a workers comp. expert regarding filing requirements for workers comp indemnity benefits.
CO: DEPUTY SHERIFF WITH DIABETES – INSULIN DEPENDENT – U.S. DOJ SETTLES LAWSUIT

On May 15, 2018, the U.S. Department of Justice issued a Press Release about the agreement with the City and County of Denver:

“The Justice Department today announced that it reached an agreement with the City and County of Denver, Colorado, (Denver) to resolve its lawsuit alleging that the Denver Sheriff Department discriminated against a long-time Deputy Sheriff on the basis of his disability, insulin-dependent diabetes. The Justice Department’s complaint alleges that Denver failed to engage in an interactive process with the employee to determine an appropriate accommodation, failed to reasonably accommodate his disability, and then terminated him, in violation of the Americans with Disabilities Act (ADA). Under the agreement, Denver will revise its reasonable accommodation policies and procedures, and will conduct training on the ADA for Sheriff Department supervisors, command staff, and human resources personnel. In addition, Denver will pay $100,000 in compensatory damages to the employee.”


Legal Lessons Learned: Fire & EMS departments must also “engage in an interactive process” when an employee appears to have a disability, including exchange of medical information between employee’s physician and the department’s doctor.
Chap. 10 Family Medical Leave Act, including Military Leave

10-10

IL: CHICAGO FF WHILE ON MILITARY LEAVE – MISSED TEST FOR ENGINEER, FD REFUSED MAKE-UP – CASE PROCEED

On Oct. 23, 2020, in lawsuit filed by U.S. Department of Justice in Derrick Strong v. City of Chicago, U.S. District Court Judge Elain E. Bucklo, Northern District of Illinois, denied the City’s motion for summary judgment. The written exam for Firefighter Engineer was given on Nov. 14, 2016. When the firefighter completed his active duty in June 26, 2017, he requested a make-up exam but was denied. The U.S. Department of Justice filed this lawsuit on his behalf under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), 38 U.S.C. § 4313, even if the City had offered him opportunity to take exam remotely while on military duty.

“Accordingly, plaintiff can potentially prevail on his § 4313 claim if he can show that without undue hardship, the City could have administered a make-up examination upon his return to service that might have earned him a spot on the 2016 Eligibility List. Of course, plaintiff would also have to show that his promotion to Fire Engineer was reasonably certain assuming his successful completion of the exam.

***

The City also argues that because it offered to administer the exam remotely during plaintiff's period of active duty, it was not required to offer him a make-up exam upon his return. As noted above, however, the inquiry into the reasonableness of an employer's efforts focuses on hardship to the employer in qualifying the returning service member after his or her return from service, not on the employer's conduct during the service member's military leave. Moreover, one of USERRA's primary purposes is 'to encourage military service by minimizing the disadvantages to civilian careers.' DeLee v. City of Plymouth, Ind., 773 F.3d 172, 175 (7th Cir. 2014). While it may be true that plaintiff could have avoided missing the qualifying exam if he had agreed to take the written portion remotely, plaintiff might be able to show that requiring him to prepare for and take the test during his period of active duty placed him at a disadvantage as compared to non-service members, arguably in violation of the statute's purpose."

Legal Lesson Learned: The U.S. Department of Justice has aggressively enforced the Uniformed Services Employment and Reemployment Rights Act. See their Web page: https://www.justice.gov/crt/servicemembers/other-resources.

See also the Complaint they filed in this case: https://www.justice.gov/crt/case-document/file/1227366/download. He was on military duty as an attorney at Fort Riley, Kansas. “On October 31, 2016, Jill May notified Strong that the DHR’s October 5, 2016, grant of his request to take the Fire Engineer examination upon his return from active duty was erroneous. She noted that the DHR was prepared to remotely administer the first part of the examination to Strong on December 10, 2016, while he
was on approved military leave from the CFD, at the site of his military duty station, and required that he accept or decline the remote test administration notice by November 4, 2016.” [Para. 32.]

Relief requested includes: “should his score merit, providing Strong a certification for promotion date that corresponds to that of others who took the 2016 Fire Engineer promotional examination and achieved the same or similar score…” [Para. 62 (40.)]

10-9

AL: MEDIC WORKED 48-HR SHIFT - “I CAN’T TAKE IT ANYMORE” & I’M TURNING IN GEAR – FD SAID HE RESIGNED - NO FMLA VIOL.

On Oct. 6, 2020, in Kyle Blake v. City of Montgomery, Alabama, U.S. District Court Judge R. Austin Huffaker, Jr., Middle District of Alabama, granted the City’s motion for summary judgment. The plaintiff was burned out from being forced to work 48-hour shifts and told his Supervisor he would turn his stuff.

“Does telling your employer that, due to burnout, you ‘couldn't do it anymore’ and that you ‘would turn [your] stuff in if [you] needed to’ support a claim under the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. (‘FMLA’) when your employer ultimately accepts these statements as your voluntary resignation from your job? … Plaintiff Kyle Blake claims that it does, and this lawsuit tests the legitimacy of that position.

***

“Blake's statements to Hackett that he ‘couldn't do it anymore,’ that he would ‘turn [his] stuff in,’ and that he needed to speak with his wife to sort this out, simply do not rise to a level sufficient to give the City notice he was experiencing a serious medical condition, let alone a qualifying medical condition, of any sort for which he wanted, needed or should be given FMLA leave.”
https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZmLHUFłuj8t0T%2BAyFM6B%2BS9SNpejaiKBu7OSzXfoy%2FQ

10-8

IL: FF IN U.S. ARMY RESERVE – NOT ENTITLED TO “DIFFERENTIAL PAY” UNDER USERRA – MAY HAVE CLAIM UNDER STATE STATUTE

On September 28, 2020, in Gregory Heckenbach v. Bloomingdale Fire Protection District et al., U.S. District Court Judge Steven C. Seeger granted the City’s motion for judgment on the pleadings concerning alleged violation of the federal USERRA (Uniformed Services Employment and Reemployment Rights Act of 1964). While the State of Illinois has enacted a statute requiring differential pay under the Illinois Military Leave of Absence Act (for example, plaintiff states Chicago Police Department makes up difference) the federal statute has no such provision. Court also dismissed his defamation claim concerning FD calls to his Army Reserve commanders, since Illinois has
a statute protecting public employees from on duty defamation claims. His lawsuit on other counts concerning hostile workplace may proceed; he may also now sue in State court on his differential pay claim.

“Heckenbach relies on the fact that the Illinois Military Leave of Absence Act requires differential pay. Id. at 4-5. Again, that's the statute that governed during the period in question. The text of the statute required differential pay during training, see 5 ILCS 325/1(a) (repealed 2019), and during active duty, see id. at § 1(b). Like that statute, the current Illinois statute requires differential pay, too. The text is straightforward: ‘Differential compensation shall be paid to all forms of active service except active service without pay.’ See 330 ILCS 61/1-15(b).

That language sinks, rather than supports, Heckenbach's argument. No comparable language appears in the federal statute. The USERRA does not mention differential pay, let alone require public entities to pay it. The text of the state statute expressly requires differential pay, but the text of the federal statute does not. If anything, the foothold for differential pay in the state statute exposes the fact that there is no toehold for differential pay in the federal statute.”

https://public.fastcase.com/Wi%2B2t%2BeVuI35%2FN70vAMFZpdjKXDmRY5LJSAOUJ86zVs5waUL1YS3yBNiSKE8F5Gl

Legal Lessons Learned: USERRA provides for unpaid but job protected leave for service in the uniformed services. If you are in the Reserves, keep your FD well informed when you will be on military duty.


10-7

IL: LT. TOOK FMLA LEAVE FOR A MONTH – FIRED AFTER FD INVESTIGATION - FAILURE TO PAY HIS SHARE OF SHIFT’S MEAL FUND

On July 9, 2020, in Melvin H. Brown v. UChicago Argonne LLC, U.S. District Court Judge Gary Feinerman, Northern District of Illinois, Eastern District (Chicago) granted summary judgment to the employer. The Court wrote: Brown’s position that Argonne inadequately investigated Weber’s dinner fund complaint is, even if supported by the record, insufficient to establish pretext given the absence of evidence suggesting that Argonne did not sincerely believe that Brown had abused his authority in failing to reimburse Weber.”

Legal Lesson Learned: FMLA statute includes protection against retaliation, but employee must still prove that the discipline imposed was in fact retaliation.

Note: Fire Department at Argonne National Laboratory, which is managed by the University of Chicago; http://chicagoareafire.com/blog/tag/argonne-national-laboratory-fire-department/

10-6 [Also filed, Chap. 9 & Chap. 15]

PA: FF PANIC ATTACK ON DUTY – PTSD, MEDICATION – NO LONGER QUALIFIED AS FF – TERMINATION NOT VIOL. ADA

On April 17, 2020, in Robert Carpenter v. York Area United Fire And Rescue, U.S. District Court Judge Christopher C. Conner, Chief Judge, Middle District of Pennsylvania, granted the FD’s motion for summary judgment. The Court held that the firefighter was not a “qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation,” and indefinite leave of absence was not a reasonable accommodation; “there must be some expectation that the employee could perform his essential job functions in the ‘near future’ following the requested leave.

“[Fire Department] argues that Carpenter is not a qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation. We agree.”
https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZkkc03nKI8qkpSJ%2FzmzLggswfoR1Rvb DETmM60pPGUhc

Legal Lessons Learned: FF on leave and undergoing treatment, who desires to get back to the job, needs to stay in communication with FD. FMLA also addressed (see below).

Note: Court also held that the FF was not entitle the FMLA leave. “In a letter dated October 11, 2017, YAUFR denied Carpenter's FMLA leave request…. YAUFR explained that, although it was a covered employer under the FMLA, it did not employ the requisite number of people for Carpenter to be considered an ‘eligible employee’ under FMLA regulations. *** To qualify as an ‘eligible employee,’ the employee must be ‘employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.’ 29 C.F.R. § 825.110(a)(3); see 29 U.S.C. § 2611(2)(B)(ii). YAUFR avers, and Carpenter concedes, that YAUFR has never employed 50 or more people.”

10-5


“The Civil Rights Division enforces multiple federal laws that protect the rights of servicemembers and veterans. We protect servicemembers’ financial and housing rights by enforcing the Servicemembers Civil Relief Act, or the SCRA. Since January 2017, our SCRA settlements have included over $10 million in damages and civil penalties. We protect servicemembers’ civilian employment rights by litigating claims against employers who violate the Uniformed Services Employment and Reemployment Rights Act, or USERRA. And, we protect their voting rights by enforcing the Uniformed and Overseas Citizens Absentee Voting Act, also known as UOCAVA. The Division also safeguards the rights of servicemember spouses, dependents, and veterans eligible for certain protections under the SCRA and UOCAVA. *** It is at this time we also ask employers and landlords to be mindful of the responsibilities they have with respect to members of the National Guard and Reserve under USERRA, the SCRA and similar state laws. These servicemembers are being pulled from their homes and jobs and tasked with vital operations in protection of our most vulnerable citizens. When this emergency ends, USERRA and other state laws will protect servicemembers’ prompt reemployment and continued pension benefits. These laws also protect servicemembers from discrimination based on their service.”


10-4

IL: Justice Department Files Lawsuit Against the City of Chicago To Enforce USERRA Rights of U.S. Army Reservist

“On Dec. 17, 2019, the Department of Justice filed a complaint in the U.S. District Court for the Northern District of Illinois on behalf of Captain and Judge Advocate Derrick Strong against the City of Chicago Fire Department (CFD), alleging that the City violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) when it failed to provide Strong with an opportunity, after his return from active duty military service, to take a promotional examination that he missed while deployed. *** According to the complaint, Strong is currently assigned to the 416th Theater Engineer Command’s (TEC), Office of the Staff Judge Advocate as a trial counsel and administrative law attorney, where he provides legal advice and overall legal support to the 416th TEC and its Command. He is also employed as a cross-trained firefighter and emergency medical technician-basic (firefighter/EMT) for the Chicago Fire Department. Strong is currently assigned to Squad 5, which is a special operations heavy rescue unit. From Sept. 30, 2016, to June 26, 2017, he was actively deployed with the U.S. Army Reserve in support of Operation Enduring Freedom. While Strong was deployed, the city of Chicago administered a test for firefighters to become fire engineers. He alleges, as outlined in the complaint filed in federal court, that the CFD violated USERRA by failing to provide him with an opportunity to take a fire engineer promotional examination following his return to work upon his honorable discharge from active duty military service.

“The Justice Department gives high priority to the enforcement of servicemembers’ rights under USERRA. This lawsuit stems from a referral to the Department of Justice from the U.S. Department of Labor, after an investigation by the Department of Labor’s Veterans’ Employment and Training Service. Additional information about USERRA can be found on the Justice Department’s websites at https://www.justice.gov/crt-military/employment-rights-userra and https://www.justice.gov/servicemembers, as well as on the Department of Labor’s website at https://www.dol.gov/agencies/vets/programs/userra.”
10-3: FL – FF / U.S. ARMY RESERVE - USERRA LAWSUIT DISMISSED – NOT PROMOTED TO DISTRICT CHIEF – CITY USES “RULE OF 5”

On April 29, 2019, in John H. Ramirez v. City of Fort Lauderdale, U.S. District Court judge William P. Dimitrouleas, Southern District of Florida, granted the City’s motion to dismiss, but Plaintiff was afforded an opportunity to file an amended Complaint to show he was denied promotions because of his military service.

During Plaintiff’s employment, he served in the United States Army and was called for various deployments. Plaintiff has repeatedly applied for promotion to Division Chief and was passed over for promotion several times. *** Defendant uses the rule of five to select personnel for promotion, which, according to Plaintiff violates Plaintiff's rights under USERRA by ‘not following the State of Florida Veterans preference.’ Plaintiff has complained to the Defendant that his military service was a factor in the decision to deny him promotion.

***

To establish a prima facie case under USERRA, "a plaintiff must show by a preponderance of the evidence that his protected status was a motivating factor in the challenged action." Dominguez v. Miami-Dade Cty., 669 F. Supp. 2d 1340, 1347 (S.D. Fla. 2009), aff’d, 416 F. App’x 884 (11th Cir. 2011). *** The Court finds that Plaintiff has failed to meet the burden to allege that his protected status as a servicemember was the motivating factor behind Defendant's choice not to promote him.


Legal Lesson Learned: Plaintiff failed to show that his protected military status was a motivating factor in not being promoted.

10-2

U.S. DEPT. LABOR – HEALTHY PERSON DONATING ORGAN ENTITLED TO FMLA LEAVE

On Aug. 28, 2018, the U.S. Department of Labor issued Opinion No. FMLA2018-2- A.
“This letter responds to your request for an opinion letter concerning whether organ-donation surgery can qualify as a ‘serious health condition’ under the Family and Medical Leave Act of 1993 (FMLA). As discussed below, we conclude that it can.”


Legal Lessons Learned: Helpful to have an Opinion Letter that may encourage others to be organ donors.

OH: DAYTON FD RECRUIT – REMOVED FROM CLASS AFTER KNEE INJURY – NO FMLA VIOLATION [also filed, Chap. 14]
On Feb. 9, 2018 in Shawn N. Geisel v. City of Dayton, et al., Ohio Court of Appeals for Second Circuit (Montgomery County) held (3 to 0) that the FD had the authority to remove him from the recruit class and ‘demote’ him back to EMT.

“We do not mean to imply that Geisel could not reapply for the position, but only that his appointment to Firefighter Recruit was a self-contained opportunity that did not entail a right to be reappointed or to continue as a recruit until he could complete the training program.”


Legal Lesson Learned: Dayton Civil Services rules treat a FF recruit as a probationary employee; when injured in recruit school, he can be “demoted” back to EMT-B and placed on light duty.
Chap. 11 Fair Labor Standards Act

11-20

FL: “ON CALL” TIME - DEPUTY SHERIFF, 1-HR TO RESPOND – PERSONAL TIME NOT SEVERELY RESTRICTED – NO PAY

On Oct. 3, 2020, in Joseph Caiazza, on his own behalf and those similarly situated v. Carmine Marceno, U.S. District Court Judge Sheri P. Chappell, Middle District of Florida (Fort Myers Division), granted the County’s motion for summary judgment concerning on call time; during on call times, Deputy Sheriff had to respond within one hour, and no alcohol; but case may proceed on plaintiff’s allegation that County failed to pay him when held over after working shifts.

“Caiazza contends all the time he spent on call is compensable. Marceno counters that such time was not spent working under the FLSA, so no pay was necessary. The Court agrees with Marceno and holds the time Caiazza spent on call (but not called out) was not compensable, so Caiazza is not entitled to overtime pay based on those hours.”

https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZjQ0yk8eNGgy%2FibI6B2NDAJYgZ2PRe3I9j%2FKWgfFbNa7

Legal Lesson Learned: Unless the on call employee is severely restricted in his personal pursuits, the employee is “off the clock.”

11-19

IN: FLSA SETTLEMENT APPROVED BY FED. JUDGE - $26K AND TOWN DROPPED DEMAND THAT FF PAY BACK $89,878 IN OVERPAY


“Counsel for the parties represent that they reached an arms-length agreement to settle the case on August 10, 2020, after two months of extensive negotiations over the language of the Settlement Agreement. The parties agree that Plaintiffs’ attorney’s fees are reasonable in relation to the requirements of the case. They finalized the terms of the Settlement Agreement on August 25, 2020.

The Settlement Agreement provides for a total payment of $26,371.24, which includes (1) a payment of $647.40 to Plaintiff Amanda Shine for back pay and liquidated damages, inclusive of all attorney's fees and costs; (2) a payment of $723.84 to Plaintiff Michael A. Coslet for back pay and liquidated damages, inclusive of all attorney’s fees and costs; and (3) a payment of $25,000.00 in attorney’s fees. The Settlement
Agreement further provides for significant non-economic awards such as the addition of four vacation days in lieu of reduction time (and the elimination of reduction time), enacted through amendments to the Personnel Handbook and to the agreement between the Town of Chesterton and Chesterton Firefighters Local 4600; waiver of the $89,878.26 overpayment the Town of Chesterton alleges is owed by ten of the Plaintiffs; and the removal of a reprimand in two of the Plaintiffs' personnel files. And, the Settlement Agreement provides that Plaintiffs and the Town of Chesterton agree to dismiss all of their claims with prejudice within three business days of receipt of the settlement funds. The parties have submitted a spreadsheet showing the breakdown by named Plaintiff of the alleged overtime wages owed, the pre-suit payments made, the amounts to be paid pursuant to the Settlement Agreement, and the overpayments that will be waived pursuant to the Settlement Agreement. See ECF No. 60-1.”

Legal Lesson Learned: FLSA settlements must be approved by Federal court or by the U.S. Department of Labor to ensure fairness of the settlements.

Note: The governing provision of the FLSA provides:

“The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.” 29 U.S.C. § 216(c).

11-18

**TX: DALLAS / FORT WORTH AIRPORT FD – CROSS-TRAINED PERSONNEL IN EMS DIVISION ONLY DID EMS DUTIES - OVERTIME AFTER 40 HOURS**

On Sept. 28, 2020, in Douglas Patterson, et al. v. Dallas/Fort Worth International Airport Board, U.S. District Court Judge Ada Brown held that the FD failed to prove that the cross-trained EMS Division personnel ever engaged in firefighting in 3 years prior to the 2019 merger of EMS and Fire Service Divisions; only two of EMS personnel engaged in live fire training, and SOG for EMS Division had no firefighting responsibilities. Court granted Summary Judgment to the plaintiffs and they are entitled to overtime after 40 hours, with back pay for 2 years; not 3 years and not liquidated damages [back pay doubled] since FD acted in good faith. 29 USC 260: https://www.law.cornell.edu/uscode/text/29/260

“The fact that DFW required plaintiffs to hold firefighting certifications is some indication that they might be expected to engage in fire suppression. However, neither Chief McKinney's declaration nor any other evidence shows the circumstances, other than the odd training exercise, under which plaintiffs might have been required to engage in fire suppression prior to this lawsuit being filed. Instead, they were assigned exclusively to MICUs or Trauma Unit 611, neither of which held any fire rescue or firefighting equipment. They were not dispatched to every fire incident and did not wear their bunker gear when responding to calls. Perhaps most importantly, the SOP setting out their procedures and responsibilities made no reference to fire suppression. Nor is there any evidence that plaintiffs would be disciplined for failing to engage in fire suppression. Without more, the Court finds DFW has not met its burden to show, or raised a genuine issue of
material fact, that plaintiffs had even a forward-looking obligation or responsibility to engage in fire suppression as EMS division Firefighters before this suit was filed. Compare Regan v. City of Hanahan, No. 02-16-cv-1077-RMG, 2017 WL 2303504, at *3 (D.S.C. May 26, 2017) (plaintiffs, who were almost always assigned to ambulances but, at various times, were assigned to fire trucks, were employees in fire protection activities). Accordingly, plaintiffs are entitled to summary judgment that they were not employees in fire protection activities and the section 207(k) exemption does not apply."

Legal Lessons Learned: The FD may appeal this decision. As the Trial Court judge acknowledged in this case, there are several Federal Courts of Appeal that have held that FD personnel who are trained as both EMS and firefighters (“cross trained”), but assigned only to EMS duties, are “firefighters” under the 207(k) exemption.

Note: The Court denied summary judgment to plaintiffs on issue of bonus payments; this will be decided in future proceedings. The plaintiffs’ in their 2018 Complaint allege that bonuses were not included in their “regular rate” of pay when calculating overtime pay.

56. Plaintiff and Class Members’ regular rate must include all compensation, bonuses, and other remuneration paid by Defendant for purposes of calculating the overtime rate. See 29 C.F.R. 778.208. Defendant has failed to include all bonuses into the regular rate for purposes of calculating the overtime premium rate. http://www.firefighterovertime.org/wp-content/uploads/2018/03/DFW-FLSA-Complaint-2018.pdf

Court held: Without any evidence on the issue, plaintiffs cannot be entitled to summary judgment. See FED. R. CIV. P. 56(c). Further, DFW presented evidence that, where plaintiffs were entitled to overtime pay in a given pay period, they received an overtime adjustment to compensate them for the increased regular rate for that pay period based on incentive pay received (Doc. 65-30). Accordingly, the Court must deny plaintiffs' summary judgment motion on this ground.

Note – New DOL Rules On Regular Rate Of Pay

The U.S. Department of Labor, on Jan. 15, 2020, issued its “Final Rule” changes on items to be excluded from the “regular rate of pay.” “The final rule clarifies when payments for forgoing unused paid leave, payments for bona fide meal periods, reimbursements, benefit plan contributions, and certain ancillary benefits may be excluded from the regular rate.”

LA: CITY OWES $1.6 MILLION BACKPAY 32 FF – LONGEVITY - MUST WAIT FOR MUNICIPALITY TO RAISE $ THROUGH LEVY

On Sept. 23, 2020, in Arnold Lowther v. Town of Bastrop, the Court of Appeal, Second Circuit, State of Louisiana, held (3 to 0) that while the firefighters won their 2008 lawsuit in 2014, and trial court ordered the City and its fire department to enact a uniform pay plan, which the trial court approved with backpay from 2005. However under Louisiana law the courts cannot order municipality to create a deficit. According to Press Reports, $1.6 million in back pay: “A recent judgement from a lawsuit dating back to 2005 under a prior administration mandates that the city must repay $1.6 million to 32 current and former firemen. The suit claimed city firemen weren't paid properly for their longevity, performance or responsibilities for a number of years. The problem Mayor Henry Cotton says is that the city doesn't have that kind of money, and needs a mill increase to do it. The proposal would be designated for 10 years to repay the debt.” [Link]

Legal Lessons Learned: In order for these 32 current and former fighters to collect on their judgment, they must wait for the City to raise the money.

11-16

IN: FLSA SETTLEMENT – CITY SETTLES WITH 15 FF - PLUS NOT DEMAND PAYBACK OVERPAYMENTS – FED JUDGE MUST APPROVE

On Sept. 22, 2020, in Eric Camel, et al. v. Town of Chesterton, Indiana and John Jarka, Fire Chief, U.S. District Court Judge Theresa L. Springmann, U.S. District Court, Norther District of Indiana (Hammond Division) has generally approved the settlement, but has taken the matter “under advisement” until the parties advise the Court how much of the funds go to attorney fees. Plaintiffs allege, among numerous other claims against both Defendants, that Defendant Town of Chesterton failed to comply with statutory overtime provisions when it failed to pay them overtime wages when they worked in excess of 204 hours in a twenty-seven (27) day work period from 2011 through and including 2019.

“Under the FLSA, settlement agreements for the recovery of unpaid overtime compensation must be approved by the Court in the absence of direct supervision by the Secretary of Labor.

***

The Settlement Agreement provides for a total payment of $26,371.24, which includes (1) a payment of $647.40 to Plaintiff Amanda Shine for back pay and liquidated damages, inclusive of all attorney's fees and costs; (2) a payment of $723.84 to Plaintiff Michael A. Coslet for back pay and liquidated damages [amount
owed, doubled], inclusive of all attorney's fees and costs; and (3) a payment of $25,000 to all Plaintiffs, inclusive of all attorney's fees and costs.

***

The Settlement Agreement further provides for significant non-economic awards such as the addition of four vacation days in lieu of reduction time (and the elimination of reduction time), enacted through amendments to the Personnel Handbook and to the agreement between the Town of Chesterton and Chesterton Firefighters Local 4600; waiver of the $89,878.26 overpayment the Town of Chesterton alleges is owed by ten of the Plaintiffs; and the removal of a reprimand in two of the Plaintiffs' personnel files.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZtsu4ffMdPWfOx%2BdxBXmfVAnwIw9ms7kbCEt1faHV%2BzM

Legal Lessons Learned: FLSA requires approval of settlements by U.S. Department of Labor, or by U.S. District Court judge.

Note: See FD’s web page: The department currently has 15 full-time personnel that staff an engine 24/7/365, as well as a full time Fire Chief and Deputy Fire Chief. The department also utilizes a staff of 15 volunteer personnel who respond to calls for assistance. https://www.chestertonin.org/145/Fire-Department

11-15

DC: FLSA – WORKING FROM HOME – NEED SYSTEM THAT REQUIRES HOURLY EMPLOYEES TO REPORT THEIR HOURS

On Aug. 24, 2020, the U.S. Department of Labor, Wage & Hour Division, published FIELD ASSISTANCE BULLETIN No. 2020-5: “Employers’ obligation to exercise reasonable diligence in tracking teleworking employees’ hours of work.”

“In a telework or remote work arrangement, the question of the employer’s obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements. An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. See 29 C.F.R. § 785.11-12. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.

***

If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours.”

Legal Lessons Learned: Fire departments that allow administrative or other hourly personnel to work from home should implement an online system for reporting of hours worked.

Note: The DoL referenced Allen v. City of Chicago, 865 F.3d 936, 945 (7th Cir. 2017), cert. denied, 138 S. Ct. 1302 (2018), where the 7th Circuit held:

“This appeal arises from a Fair Labor Standards Act collective action. Plaintiffs are current and former members of the Chicago Police Department’s Bureau of Organized Crime who claim that the Bureau did not compensate them for work they did off-duty on their mobile electronic devices (BlackBerrys). The case was tried to the court. Magistrate Judge Schenkier, presiding by consent under 28 U.S.C. § 636(c). The judge issued detailed findings of fact and conclusions of law in favor of the Bureau, finding that it did not prevent plaintiffs from requesting payment for such non-scheduled overtime work and did not know that plaintiffs were not being paid for it. Plaintiffs appeal, but we find no persuasive reason to upset the judgment of the district court. We affirm the judgment for the Bureau.

***

The [trial court judge, after a 6-day bench trial] agreed with plaintiffs that some of their off-duty BlackBerry activity was work that was compensable under the FLSA. It acknowledged evidence that Bureau supervisors knew plaintiffs sometimes worked off-duty on their Black-Berrys. But the court also found that the supervisors did not know or have reason to know that plaintiffs were not submitting slips and therefore were not being paid for that work. Although supervisors in theory could have checked what they knew of plaintiffs' off-duty work against the time slips they approved, the court found that requiring them to do so would be impractical: supervisors approved a large number of slips per day, and slips were sometimes submitted and reviewed well after the work was performed. Also, the court found, plaintiffs never told their supervisors that they were not being paid for such work.”

https://www.leagle.com/decision/infco20170803124

11-14

MO: FLSA – FLIGHT MEDIC – AIR EVAC IS “COMMON CARRIER” AND CAN PAY OVERTIME AFTER 84 HRS / 2 WKS

On Aug. 17, 2020, in Jacob Rieglsberger, individually and on behalf of all similarly situated persons v. Air Evac EMS, Inc. et al., the U.S. Court of Appeals for the 8th Circuit (St. Louis) held (3 to 0) that plaintiff’s arguments “do not get off the ground.”

“Rieglsberger's arguments to the contrary do not get off the ground. It makes no difference, for example, that medical providers, rather than the patients themselves, are the primary points of contact in arranging transportation. Just as a major airline can still be a common carrier if a passenger uses a travel agent to arrange transportation, health-care providers can provide the same service for their patients without affecting Air Evac’s common-carrier status. Cf. Air Evac EMS, Inc., 910 F.3d at 764 (making a similar analogy). The fact that intermediaries are involved, in other words, does not change what Air Evac ‘actually does,’ which is
Legal Lessons Learned: Flight medics are entitled to overtime.

Note: See this recent settlement: “Air medical company agrees to $78M settlement for overtime” (July 2, 2020); https://www.ems1.com/legal/articles/air-medical-company-agrees-to-78m-settlement-for-overtime-ExknCez8O1D6ZfI4/

“OAKLAND, Calif. — A medical helicopter operator has been ordered to pay $78 million to its flight crew employees for unpaid overtime and missed breaks in a class-action lawsuit settlement. Alameda County Superior Court Judge Winifred Y. Smith agreed Wednesday to the preliminary settlement filed by about 450 former and current medical flight crew members employed in California by Air Methods Corporation of Colorado.

Air Methods also is expected to pay daily overtime to its medical flight crew starting from June 28, resulting in an estimated 20% or more increase to their salaries, according to the attorneys representing the crew.

Air Methods is reportedly the country’s largest air medical transport company and operates helicopter bases. Teams of nurses and paramedics are dispatched in the helicopters, often to remote areas.

Air Methods was accused of refusing to pay daily overtime for crews working more than eight hours in a workday. The flight crew commonly worked 24-hour shifts, according to attorney James Sitkin, who represented the crew. He alleged that Air Methods did not allow the flight crew to take off-duty meal breaks or rest breaks.”

11-13

GA: COMP TIME – FIREFIGHTERS SUED FD FOR DENIAL LEAVE - SETTLED, 14 FF PAID $1000 EACH - NEW FD POLICY – ATTY FEES

On July 16, 2020, in Robert Milie, et. al. v. City of Savannah, U.S. District Court Judge R. Stan Baker, Southern District of Georgia, the Court pursuant to the settlement agreement approved attorneys’ fees. Court wrote: For the reasons set forth below, the Court finds the following across-the-board reductions of Plaintiffs' requested hours to be appropriate: a thirty percent (30%) reduction to the hours billed in Plaintiffs’ initial fee petition …; a sixty percent (60%) reduction to the hours billed in Plaintiffs’ first supplemental request…; and a one-hundred percent (100%) reduction to the hours billed in the second supplemental request…..”
https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZqOCluAWFXT7dyJbWSJtbA2tJbGDR%2F5EmjVbjMYm1QS

Legal Lessons Learned: Comp time requests can sometimes lead to disputes; helpful to have a clear process in the CBA or FD policy.
11-12

WI: PARAMEDIC SUED VILLAGE – CLAIMED NOT PAID OVERTIME AFTER 40 HRS - PROPOSED $55K SETTLEMENT, COURT REQUIRES MORE INFO TO CONFIRM FAIR AMOUNT

On May 13, 2020, in Joshua Wendorf v. Village of Plover, U.S. District Court William M. Conley, Western District of Wisconsin, declined to approve the settlement, and gave parties 14 days to submit further information regarding “whether (a) plaintiff’s compensation under the agreement is reasonably consistent with the minimum hourly wage calculation contemplated by the FLSA; and (b) counsel's fee recovery is consistent with plaintiff’s written agreement or otherwise supported on this record.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZiOi%2BYkXYMCNnCyjC1oPHdpZa1VeL Chap 2kxy9UfPfNs

Legal Lessons Learned: If the paramedic was not “cross-trained” as a firefighter, or had no firefighting duties, he would normally be entitled to overtime pay after 40 hours in a work week.

Note: Section 7(k) of the FLSA provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. https://www.law.cornell.edu/cfr/text/29/553.201

11-11

U.S. DEPT. OF LABOR: BONUS PAYMENTS FOR LENGTH OF SERVICE – IF GUARANTEED, MUST INCLUDE IN “REGULAR RATE OF PAY”

On March 26, 2020, the U.S. Department of Labor, Wage & Hour Division, issued Opinion Letter FLSA 2020-3.
“Based on the facts you have provided, the City’s longevity payments made to employees pursuant to the 1981 Resolution are not excludable as ‘payments in the nature of gifts’ under Section 207(e)(1)…. Thus, longevity payments to eligible employees are required by the 1981 Resolution…. Rather, such longevity pay required by law must be included in the regular rate…. If, on the other hand, the City’s Resolution said that “eligible employees of the City may be entitled to longevity pay” of up to a maximum amount … the payments could still be excluded from the regular rate…."


Legal Lessons Learned: Under this opinion letter, employees of this city who are paid on an hourly basis will now be entitled to a higher hourly rate of pay based on the guaranteed annual longevity bonus. See the regulation:

29 U.S.C. § 207(e)(1)
(e) “Regular rate” defined
As used in this section the “regular rate” at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.…. https://www.law.cornell.edu/uscode/text/29/207

11-10

KY: 428 FLIGHT MEDICS, RNS, PILOTS - OVERTIME AFTER 120 HOURS – CLASS ACTION - $2,950,000 SETTLEMENT

On Jan. 21, 2020, in Jason Peck v. Air Evac EMS, Inc., d/b/a Air Evac Lifeteam, U.S. District Court Chief Judge Danny C. Reeves, U.S. District Court, Eastern District of Kentucky, Central Division (Lexington), approved the class action settlement, including attorney fees.

“The parties previously agreed to a gross settlement fund of $3,000,000.00, including up to $800,000.00 in attorney’s fees and costs and a $15,000.00 incentive for Peck. The parties later filed a motion to amend the settlement seeking $750,000.00 in attorney’s fees and a gross settlement fund of $2,950,000.00… The Court granted the motion to amend the settlement to reduce the amount of attorney’s fees. The proposed class includes 428 ‘current and former flight nurses, flight paramedics, and pilots employed by [Air Evac] in the Commonwealth of Kentucky at any time from October 25, 2013 through July 17, 2019.’ …. The parties explained that individual settlement payments were calculated by reviewing Air Evac’s payroll and timesheet records to establish the amount of unpaid overtime for each class member assuming that the claims were true.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZpr47IYL%2FNqq46QG15nW3r0g0xInlPjzGPN7upgPO%2BUR

Legal Lessons Learned: Overtime claims can result in very large settlements; if in doubt about overtime eligibility, contact U.S. Department of Labor, Wage & Hour Division.
CA: THREE FF CLAIMED NOT PAID CORRECT “REGULAR RATE OF PAY” FOR 6 PAY PERIODS – CITY PROVED IT WAS ACTUALLY OVERPAYING

On Jan. 15, 2020, in Darren Wallace v. City of San Jose, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (3 to 0) that the U.S. District Court judge properly granted summary judgement for the city. Court decided case without even needing to schedule oral argument.

“Under 29 U.S.C. § 207(k), public agencies employing firefighters may adopt a 28-day work period for purposes of calculating FLSA overtime pay. FLSA requires overtime pay of 1.5times the regular rate of pay for every hour above 212 hours that a firefighter works in a 28-day work period. See id.; 29 C.F.R. § 553.230. The City has adopted a 28-day pay period for its firefighters and pays them biweekly. It pays firefighters a base hourly rate for 224 hours per work period, regardless of whether they actually work a full 224 hours. Furthermore, when a firefighter works hours outside of his or her regularly scheduled shifts, the City pays ‘contractual overtime’ of 1.5 times his or her base hourly rate for each additional hour worked. The City’s ‘contractual overtime’ payments are distinct from FLSA overtime pay, and the firefighters are entitled to FLSA overtime pay for each hour worked over the 212-hour threshold…. Each work period, the City calculates what is owed to its firefighters under FLSA. If the amount the City paid a firefighter is less than required under FLSA, it adds a FLSA overtime adjustment to the firefighter’s paycheck at the end of the work period. If the amount the City paid is more than required under FLSA, no adjustment is made.”


Legal Lessons Learned: If City is paying more than required under FLSA, then courts will grant summary judgment.

NY: FDNY - BACK PAY FOR EMS – HRS WORKED BEFORE / AFTER SHIFT – WILFULL VIOLATION – 3-YRS BACK PAY, DOUBLED - $14.4 MILLION

On Dec. 23, 2019, in Chaz Perry, et al. v. City of New York, U.S. District Court Judge Vernon S. Broderick, Southern District of New York, granted plaintiff’s motion for final judgment on behalf of 2,519 current and former EMS, and also Fire Safety Inspectors below the rank of lieutenant. A jury found the FDNY willfully violated FLSA by allowing EMS and Inspector to work early or after shift while not “on the clock.” Federal judge awarded backpay for three years for willful violation (not just two years) of $7,238,513.00, as well as an equal amount of $7,238,513.00 in liquidated damages.

“Because the jury in this case has already determined that Defendants committed a willful violation of the FLSA, I reject Defendants’ request to deny liquidated damages in this case.”

https://casetext.com/case/perry-v-city-of-ny-4

Legal Lesson Learned: Willful violations of FLSA can result in damages of three years of back pay, doubled.
GA: FF WORKING 40-HOURS, BUT CLASSIFIED “PART-TIME” - CLASS ACTION LAWSUIT ON BEHALF OF 86 FF PROCEED

On Sept. 16, 2019, in City of Roswell v. David Bible and Brian Rogers, the Court of Appeals of Georgia, held (3 to 0) that trial judge properly held that the class action lawsuit on behalf of about 86 firefighters may proceed.

Presiding Judge Christopher J. McMillan wrote:

“The City alleges that because Bible and Rogers acquiesced in their non-benefitted status and worked over 2,080 hours per year, they are not typical of other class members who did not waive their entitlement to any benefits or those who worked less than 2,080 hours per year. However, it is clear that Appellees’ breach of contract claims, arising from the City’s denial of full-time employment benefits, are virtually identical to the claims of each proposed class member. *** The City argued that in order to be considered a full-time employee, the employee should have worked 2,080 hours each year (a number that would require the employee to work 40 hours per week for each of the 52 weeks per year). However, even under the City’s proposed definition, the Appellees maintained that the class would include 86 members.”


Legal Lessons Learned: Class actions are an effective method of resolving a matter affecting numerous class members. This case will now proceed to trial, unless settled by the parties.

Note: In Ohio, see Ohio Revised Code’s “1500 Hour Rule” applies to Township firefighters:

http://codes.ohio.gov/orc/505.60

(G) As used in this section and section 505.601 of the Revised Code:

(1) "Part-time township employee" means a township employee who is hired with the expectation that the employee will work not more than one thousand five hundred hours in any year.

FLSA: DOL OPINION LETTER – WHEN EMPLOYEE IS BOTH FF / POLICE OFFICER SAME PUBLIC AGENCY – CALCULATING OVERTIME

On Aug. 8, 2019, the U.S. Department of Labor issued Opinion Letter FLSA2019- 11, confirmed that if working for same public agency, then the total hours worked are aggregated when determining overtime pay.


“If an employee works for separate and distinct employers, each employer may disregard work performed by the employee for the other employer when determining its responsibility under the Fair Labor Standards Act (FLSA). 29 C.F.R. § 791.2. However, where the employee performs “fire protection activities” for the fire department and “law enforcement activities” for the police department of the same public agency, as you state is the case here, the hours are aggregated.”
Legal Lessons Learned: When in doubt about paying overtime, review FLSA opinion letters. If still not clear, call DoL Wage And Hour Division and consult with experienced Legal Counsel.

Legal Lessons Learned: The Fire Department can always consult with U.S. Department of Labor, Wage & Hour Division, or seek a formal opinion letter concerning the proper classification of their Battalion Chiefs and Fire Marshals based on a detailed description of their job duties.

For example, see Opinion Letter FLSA 2005-40: “Accordingly, the duties described in your letter are sufficient to qualify the City’s Police Lieutenants, Police Captains, and Fire Battalion Chiefs as exempt from the minimum wage and overtime provisions of the FLSA. Therefore, so long as the actual duties performed by these employees are consistent with those described, the referenced employees are exempt from these provisions of the FLSA.”

U.S. DEPT. OF LABOR: PROPOSED NEW RULE – ITEMS NOT INCLUDED IN “REGULAR RATE OF PAY”

On March 28, 2019, the U.S. Department of Labor (Department) announced a proposed rule to amend 29 CFR part 778 to clarify and update regular rate requirements under section 7(e) of the Fair Labor Standards Act (FLSA).

“The FLSA generally requires overtime pay of at least one and one-half times the regular rate of pay for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment
employers include and exclude in the “time and one-half” calculation when determining workers’ overtime rates. Under current rules, employers are discouraged from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees’ regular rate of pay. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. Because these regulations have not been updated in decades, the proposal would better define the regular rate for today’s workplace practices.

The Department proposes clarifications to the regulations to confirm that employers may exclude the following from an employee’s regular rate of pay:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational debt

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, ‘call back’ pay, and others.

Legal Lessons Learned: This new rule will hopefully provide more clarification for Fire & EMS Departments and avoid litigation about “regular rate” of pay.

See, for example, DoL Advisory Opinion FLSA2018-5 (Jan. 5, 2018) regarding a Fire Department’s calculation of “regular rate of pay” concerning annual bonuses, such as certification pay, education pay, and longevity pay: [https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_05_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_05_FLSA.pdf)

**11-3**

**NC: FLSA – NONPROFIT, PRIVATE VOL. FD – NOT ELIGIBLE OVERTIME EXEMPTION – NOT “PUBLIC AGENCY”**

On Nov. 8, 2018, the U.S. Department of Labor issued Opinion Letter FLSA 2018-24, concluding: “Based on the facts you have provided, the nonprofit, privately owned fire departments that you describe are not public agencies within the meaning of Section 7(k) and are therefore not entitled to its partial overtime exemption.” [https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_24_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_24_FLSA.pdf)

Legal Lessons Learned: When in doubt, it is helpful to seek an “official” Opinion Letter; helps avoid litigation. These North Carolina nonprofit FDs must therefore continue to pay overtime to employees working over 40 hours in a work week. They don’t enjoy the “7(k) exemption” which allows public-sector FDs, for example, to pay overtime after 212 hours in a 28-day pay period (after 53 hours in a work week).
NY: MEAL ALLOWANCES FOR FDNY EMS – MUST BE INCLUDED IN CALCULATING “REGULAR RATE OF PAY”

On March 26, 2018, in Chaz Perry et al. v. City of New York, U.S. District Court for Southern District of New York, Federal District Judge Vernon S. Broderick held that the City must include meal allowances when calculating the “regular rate” of pay for overtime, just as City does for night shift differential pay. In this lawsuit by over 2,600 FDNY paramedics, EMTs and Fire Inspectors, other claims in the lawsuit, including compensable work performed before and after Plaintiffs’ shifts, will go to trial. https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2013cv01015/407972/168/

Legal Lessons Learned: Overtime pay is calculated by not only your hourly rate, but also other bonuses received, such as paramedic bonus and night shift differential.

See U.S. Department of Labor, Fact Sheet No. 23, and regulations. file:///C:/Users/lawre/AppData/Local/Microsoft/Windows/INetCache/IE/CTCRXJ99/whdfs23.pdf

11-1

U.S. DOL: FD CONTRACTS WITH PRIVATE COMPANY FOR EMS – EMT CAN’T VOLUNTEER IF PERFORMING SAME SERVICES


“You [ask] whether the EMTs paid by the VFC’s contractor may continue to ‘volunteer’ as EMTs for the VFC without being compensated in accordance with the FLSA. The answer to this question depends on whether the VFC is considered to be an employer of the paid staff members. If the VFC is in fact deemed to be an employer (along with the contractor) of the paid staff members, the EMTs could not ‘volunteer’ to the VFC the same services that they perform for pay for the contractor.


Legal Lessons Learned: FLSA Opinion Letters are helpful, but as in this matter are not always definitive. Fire & EMS Departments are also encouraged to meet “face to face” with Wage & Hour staff and get their informal feedback, and consider retaining Legal Counsel experienced with FLSA issues.

“In this case alleging violations of § 207 of the Fair Labor Standards Act, 29 U.S.C. § 207, plaintiffs-appellants (hereinafter ‘Plaintiffs’), fire fighters employed by the Memphis Fire Department, appeal the district court’s grant of summary judgment to defendant-appellee the City of Memphis, Tennessee on their complaint asserting overtime pay for paramedic training time. For the reasons set forth below, we AFFIRM the district court’s grant of summary judgment to the City of Memphis. *** In relevant part, the form required an applicant to agree that ‘[w]ithin three (3) years of employment with the Memphis Fire Department, you must become licensed by the State of Tennessee as a Paramedic (EMT-Advanced), as a condition of continued employment.’ Id. One hundred and eleven Plaintiffs signed the forms, and ‘[a]ll but four . . . signed in January or February 2007.’ Id. ¶ 17 (Page ID #906). When Plaintiffs signed the forms, the MFD did not tell them that the training would be uncompensated or off-duty. Id. ¶ 16 (Page ID #906).
PA: TACO BELL MANAGER CALLS 911 – CUSTOMER “ASLEEP STANDING UP” – PD FIND DRUGS – CUSTOMER CONVICTED

On Aug. 14, 2020, in Commonwealth of Pennsylvania v. Obed Nunez, Superior Court of Pennsylvania, 2020 PA Super 198, held (3 to 0) that the trial court judge properly held that the PA Overdose Immunity statute does not apply since the Taco Bell Manager William Jay called 911 because a customer was “asleep standing up,” not because the customer was necessarily having an overdose. Also PA statute requires 911 caller to remain with overdose person.

“However, Mr. Jay [Taco Bell Manager] did not make any statement during this call that he reasonably believed Appellant required immediate medical attention, see id., nor did Mr. Jay relay to the dispatcher that he reasonably believed Appellant was experiencing a drug overdose event, as defined by the Act.”

https://scholar.google.com/scholar_case?case=14934683326774120071&q=Pennsylvania+%22overdose+response%22&hl=en&scisbd=2&as_sdt=6,36&as_ylo=2020

Legal Lessons Learned: Over 40 states have enacted Drug Overdose Immunity statutes, designed to encourage fellow drug users to call 911, without fear of their own arrest.

Note: A similar decision involving a customer in a McDonald’s restaurant, Aug. 13, 2020: Commonwealth of Pennsylvania v. Francis South, 2020 PA Super 194:

“During her shift, Ms. Glass called 911 and [reported that an adult white male was passed out in the restaurant, and during the call, he got up and proceeded to exit the building and stumble through the parking lot…. To qualify for immunity, it was Appellant's burden to show that Ms. Glass reasonably believed he required emergency medical care due to a drug overdose. 35 P.S. § 780-113.7(2)(i); Lewis, 180 A.3d at 791. We agree with the trial court's conclusion that there was no evidence submitted at Appellant's trial ‘which would support that Ms. Glass, as the reporter, had any reasonable belief that Appellant was in need of immediate medical attention to prevent death or serious bodily injury from a drug overdose.’”

Trial Court Opinion, 1/10/20, at 8.’”

https://scholar.google.com/scholar_case?case=122812857478444684&q=Pennsylvania+%22overdose+response%22&hl=en&scisbd=2&as_sdt=6,36&as_ylo=2020

See also Ohio law – ORC 2925.11 Possession of controlled substances. https://codes.ohio.gov/orc/2925.11

(viii) "Qualified individual" means a person who is not on community control or post-release control and is a person acting in good faith who seeks or obtains medical assistance for another person who is experiencing a drug overdose, a person who experiences a drug overdose and who seeks medical assistance for that overdose, or a person who is the subject of another person seeking or obtaining medical assistance for that overdose as described in division (B)(2)(b) of this section.
But there is a treatment requirement:

(ii) Subject to division (B)(2)(g) of this section, within thirty days after seeking or obtaining the medical assistance, the qualified individual seeks and obtains a screening and receives a referral for treatment from a community addiction services provider or a properly credentialed addiction treatment professional.


“These laws have further limitations as well. In at least a dozen states, the Good Samaritan is required not only to call for help but also to jump through additional hoops such as providing their full name to law enforcement, staying on the scene, and cooperating with responding officers. None of those requirements are necessary to help the person suffering from an overdose; all are likely to discourage people from calling for help.”

12-7

PA: PHILADELPHIA NEW “SAFE INJECTION SITE” PROGRAM – INJUNCTION DURING COVID-19 & NATIONWIDE PROTESTS

On June 24, 2020, in United States of America v. SAFEHOUSE, U.S. District Court Judge George Austin McHugh, U.S. District Court for Eastern District of Pennsylvania, ordered that the injection program in South Philadelphia be stayed. “Although the Government has failed to show that it will suffer harms that cannot be prevented or fully rectified by a successful appeal, the ongoing challenges posed by COVID-19 and the deep social currents and introspection following the tragic killing of Mr. Floyd make this the wrong moment for another change in the status quo. Accordingly, the Government’s request for a stay will be granted.” https://www.courthousenews.com/wp-content/uploads/2020/06/safehouse-pa.pdf

Legal Lessons Learned: The Court has wise issued an injunction preventing the opening a “safe injection site” during the COVID-19 pandemic.

LA: FF REINSTATED – FIRED FOR POSITIVE MARIJUANA – HIS DOCTOR HAD APPROVED USE OF OVER-THE-COUNTER CANNABIODAL (CBD) FOR PAIN

On May 20, 2020, in Gregory Matusoff v. New Orleans Department of Fire, the Court of Appeal, Fourth Circuit, State of Louisiana, held (3 to 0) that City’s Civil Service Commission abused its discretion in deny the firefighter’s appeal. https://www.la4th.org/opinion/2019/486077.pdf

Legal Lessons Learned:  This termination makes one wonder what the FD and the Civil Service Commission were thinking.  Suggestion to FF using CBD; ask your physician for a “prescription” or other written authorization, that you can then share with your FD.

KY: DRUG USER - GOOD SAMARITAN STATUTE – IMMUNITY FROM PROSECUTION – EVEN IF 911 CALLER LEAVES

On Feb. 21, 2020, in Jeremy Logsdon v. Commonwealth of Kentucky, the Kentucky Court of Appeals held (3 to 0) that the defendant enjoys immunity from prosecution, even if the 911 caller took off (had outstanding warrants) before police & EMS arrived, reversing the decision of the [Boone Circuit Court] judge.

“We agree with both Appellant … that the Boone Circuit Court's ruling is not supported by a strict interpretation of KRS 218A.133(2). Throughout this statute, ‘the person’ may reasonably be construed as the individual experiencing a drug overdose, and for whom a third-party caller requested medical assistance. When read in this light, KRS 218A.133(2) does not require a third-party caller to be present with the individual experiencing a drug overdose when medical personnel arrive. As such, the circuit court erred in concluding that Appellant was not entitled to the KRS 218A.133(2) exemption from prosecution. Accordingly, we REVERSE the judgment of the Boone Circuit Court.” https://public.fastcase.com/Wl%2B2t%2BeVulI35%2FN70vAMFZhWagCVrrnIVHI5ze3ezrqb5nbCRO4xyuBvAFcv5WsVX

Legal Lesson Learned: Many states have enacted drug-user Good Samaritan statutes, to encourage the user or friend to call 911.
RI: DRUG USER - GOOD SAMARITAN ACT - PD FOUND 6 MARIJUANA PLANTS – IMMUNITY EVEN IF DEALER

On Feb. 7, 2020, in State of Rhode Island v. Daniel Disalvo, the Superior Court (Washington County) Judge Melanie Thunberg held that the criminal complaint must be dismissed, since the defendant is covered by the Good Samaritan Act even though he appears to be a dealer.

“At issue here is whether the State may prosecute Defendant for possession of controlled substances with the intent to deliver despite the fact that law enforcement would not have discovered the contraband but for Defendant’s need for medical attention. The parties dispute the application of G.L. 1956 § 21-28.9-4, the Good Samaritan Overdose Prevention Act of 2016 (the Act). Their arguments turn on whether the individual who experiences an overdose may seek immunity under the Act; whether the drug or alcohol user needs to actually overdose in order for the protections of the Act to apply; and whether the Act immunizes only possession related crimes—not the crime of possession with the intent to deliver. *** Again, the language contained in § 21-28.9-4(b) is dispositive. This section provides that qualifying individuals ‘shall not be charged or prosecuted for any crime related to the possession of a controlled substance or drug paraphernalia, possession or transportation of alcohol by an underage person, or the operation of a drug-involved premises, if the evidence . . . was gained as a result of the overdose and the need for medical assistance.’ Section 21-28.9-4(b) (emphasis added). *** The outcome of this dispute turns on whether the crime of unlawful possession of a controlled substance with the intent to distribute is a crime ‘related to the possession of a controlled substance.’ Id. Clearly, it is. An individual must possess the controlled substances with which he or she intends to distribute in order to be guilty of possession with the intent to deliver. Moreover, the unambiguous language of § 21-28.9-4(b) establishes that the Legislature intended that the individual who overdoses or experiences a drug- or alcohol-related medical emergency receive immunity for ‘any crime related to the possession of a controlled substance or drug paraphernalia. . . .’ Section 21-28.9-4(b) (emphasis added). The Legislature chose to use the words ‘any crime related to the possession of a controlled substance’ to delineate the crimes that would fall under the umbrella of protection afforded by the Act. The Legislature could have carved out crimes related to the delivery or distribution of controlled substances; however, as demonstrated by the existing statute, it did not.


Legal Lessons Learned: This Good Samaritan Act was written to broadly protect drug users and others who call 911 for help.

12-3

IL: PARAMEDIC USING SQUAD FENTANYL – HOSPITAL FOUND PIN HOLES IN VIALS – CONVICTION UPHELD

On Dec. 6, 2019, in United States v. Jason Laut, the U.S. Court of Appeals for the 7th Circuit (Chicago), held (3 to 0) that in a nonprecedential disposition that his jury conviction was affirmed.
“Specifically, the government stated that Laut had tampered with fentanyl vials ‘57 times in 2014, 28 times in 2015; and repeatedly referred to the ‘85 tampered vials.’ Also, when describing the 2015 tampering, the government stated that pharmacists discovered the tampered vials ‘after Jason Laut’s tampering had already been caught once ... but he got away with it.’ *** The jury found Laut guilty on all 38 counts.


12-2

NY: COURT REFUSES TO DROP DUI CHARGES AGAINST POLICE OFFICER / EMT – NOT “INTEREST OF JUSTICE”


The judge held:

“The defendant asserts that he will face discipline, including possible termination from the NYPD, if he is convicted of a misdemeanor DWI offense. He also states that he will face removal from the New York State Guard and could lose his license to work as an Emergency Medical Technician. Defense counsel asserts that these consequences would not only impact the defendant personally, but would deprive the community of the defendant's service in those roles. The court is mindful of these potential collateral consequences, but finds that they do not mandate dismissal in this case.”

Legal Lessons Learned: The job consequences of an emergency responder being convicted of driving while intoxicated can be very severe. The case will now go to a jury, unless the police officer elects to have a “bench trial” or pleads guilty.

12-1

MD: FF TERMINATED FOR ALCOHOL – GIVEN SECOND CHANCE – PRE-TERMINATION HEARING
On Oct. 19, 2018, in Darryl K. Lewis, Jr. v. City of Baltimore Civil Service Commission, et al, the Circuit Court for Baltimore City, held (3 to 0) in unreported decision that the firefighter was provided due process, affirming the Hearing Officer’s findings:

“The Hearing Officer’s Recommendation states, ‘Procedural due process was afforded in that Lewis received notice of the underlying charges and an opportunity to be heard at a pre-termination hearing. He received sufficient notification of the outcome of that hearing and was advised of his right to this investigation.’”


Legal Lesson Learned: “After Care Contracts” and other forms of last chance agreements are enforceable, and procedural due process rights were followed in this case.

Note: Consider in such agreements a requirement that the employee enroll in a continuing care program.

On Nov. 25, 2020, in Roman Catholic Diocese of Brooklyn v. Cuomo and Agudath Israel v. Cuomo, the U.S. Supreme Court (5 to 4) issued an emergency injunction on the Governor’s 10-person (“Red Zones”) and 25-person (“Orange Zones”) occupancy limits.

“Respondent is enjoined from enforcing Executive Order 202.68’s 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought.

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as ‘essential’ may admit as many people as they wish. And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.”

https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf

Legal Lessons Learned: The 5 “conservative” members of the Court issued the injunction, over the dissent of 4 other Justices.

Note: Majority decision by Justices Samuel Alito; Amy Coney Barrett; Neil Gorsuch; Brett Kavanaugh; Clarence Thomas
Dissenting: Chief Justice John Roberts; Justices Steve Breyer; Elana Kagan; Sonia Sotomayor

GA: ISLAND RESIDENTS SUE COUNTY – POOR EMS SERVICE – EXPERT’S REPORT ADMISSIBLE – RELIABLE / HELPFUL

On Nov. 23, 2020, in Melvin Banks, Sr., et al. v. McIntosh County, U.S. Magistrate Judge Benjamin W. Cheesbro, U.S. District Court for South District of Georgie, denied the County’s motion to exclude the expert testimony and report of Dr. William Fales, since he has extensive experience in EMS.
“In other words, Dr. Fales’ opinions concern how and when various healthcare assets are deployed and utilized on a system-wide basis, not the adequacy of specific forms of medical care or treatment. Dr. Fales’ recommendations highlight this distinction. For example, Dr. Fales recommends Sapelo Island First Responders should have a dedicated vehicle (Recommendation B7) and the fireboat used by McIntosh County EMS should be moved from one location to another (Recommendation C3). Doc. 273-1 at 50.

Recommendation A3 provides that the McIntosh County EMS should use Wiregrass 911 to adopt a formal 911 system. Doc. 273-1 at 48. Recommendation A4 provides the County should adopt a tiered response plan for the Sapelo Island EMS Response Plan based on patient acuity. Id. Recommendation C1 provides McIntosh County should develop a form EMS Response Plan for Sapelo Island. Id. At 49. Recommendation C2 also provides McIntosh County EMS should work in collaboration with Wiregrass 911. Id. Recommendation C6 provides McIntosh County should develop a training program for first responders serving Sapelo Island to ensure effective EMS. Id. Recommendation C7 provides McIntosh County EMS should established a quality improvement program. Id. At 50. Recommendation C9 provides McIntosh County EMS should apply for a federal grant to help better serve both the County as a whole and the Island. Id.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZu2kCKVGtKJMtqi4A8YrO%2FA1C58cJM7PHa67poZD1mrP

Legal Lessons Learned: The case may now proceed to trial. Dr. Fales has apparently never visited Sapelo Island; hopefully he will prior to trial.

Note: Sapelo Island looks like a lovely place. https://www.exploregeorgia.org/city/sapelo-island

“Sapelo is a state-managed barrier island, the fourth largest in the chain of coastal Georgia islands between the Savannah and St. Marys rivers. Accessible only by passenger ferry, Sapelo provides a number of public access recreational, educational and lodging opportunities. The Georgia Department of Natural Resources (DNR) manages the island. DNR operates the ferry service and serves as state liaison for the Sapelo Island National Estuarine Research Reserve, the University of Georgia Marine Institute, and the civilian Hog Hammock community, permanent home to about 70 full-time residents, many of whom are descended from the antebellum slaves of Sapelo’s plantations.”

13-70

OH: COVID-19 TEMPORARY STATUTE – EMS AUTHORIZED WORK IN HOSPITAL ED AND IN OTHER HOSPITAL AREAS

On Nov. 23, 2021, the Governor of Ohio signed into law House Bill 151, provides in part:

“(B) Beginning on the effective date of this section and until July 1, 2021, and not withstanding any provision of the Revised Code, a first responder, emergency medical technician-basic, emergency medical technician-intermediate, and emergency medical technician-paramedic may perform emergency medical
services in any setting, including in any area of a hospital, if the services are performed under the direction and supervision of one of the following: 1) A physician; (2) A physician assistant designated by a physician; (3) An advanced practice registered nurse designated by a physician. (C) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, and emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual’s administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct.”

*file:///C:/Users/lawre/AppData/Local/Temp/hb151_05_EN.pdf [page 20].*

**Legal Lesson Learned:** The new law will be helpful to many hospitals; Ohio EMS should keep their FD Medical Director informed of duties performed outside the ED.

**Note:** See memo from State Medical Director: [https://www.ems.ohio.gov/links/COVID-19/Legislated%20COVID-19%20Contingency%20Measures%20for%20Ohio%20EMS.pdf](https://www.ems.ohio.gov/links/COVID-19/Legislated%20COVID-19%20Contingency%20Measures%20for%20Ohio%20EMS.pdf)

“Typically, EMS medical directors and most emergency physicians are well versed in the parameters within the Ohio EMS scope of practice. However, this may not be the case with other healthcare providers or physicians who specialize in other medical specialties. Each Ohio EMS provider is responsible for their individual Ohio EMS certification and to ensure that their actions are within the authorized Ohio EMS scope of practice for their respective level of certification. **If any healthcare provider requests the provision of emergency medical services that are beyond the Ohio EMS scope of practice, it is the responsibility of the Ohio EMS provider to decline to perform skills or provide services that are not authorized by the State Board of Emergency Medical, Fire, and Transportation Services.**” [Emphasis in original.]

**13-69**

**NY: PLAINTIFF PASSED OUT AT CONCERT – REFUSES EMS HELP – ORIENTED TIMES 3 - FALLS ON HIS FACE – CASE DISMISSED**

On Nov. 19, 2020, in Anthony Fornabaio, et al. v. Beacon Broadway Company, Inc.; Transcare Corporation, et al., the Appellate Division of the Supreme Court of New York, held (3 to 0) that when a competent adult patient refuses EMS help, his lawsuit against the concert provider and Transcare, the EMS provider should be dismissed.

“Any duty Beacon or Transcare owed to plaintiff to assist him in exiting the theater terminated when he refused such assistance. It is well settled that a competent adult has the right to determine the course of his or her own medical treatment, including declining treatment (Matter of Fosmire v Nicoleau, 75 NY2d 218, 226 [1990]). Plaintiff does not dispute that he refused assistance in standing or ambulating. Further, the testimony was that the EMT technician assessed plaintiff as alert and oriented as he left his seat to exit the theater. Given this, the complaint should have been dismissed in its entirety as to defendants Beacon and Transcare (see Branda v MV Pub. Transp., Inc., 139 AD3d 636, 637 [1st Dept 2016]).”
Legal Lesson Learned: Key facts – person was “alert” and “oriented times three” – led to dismissal of this case.

MA: “EXCITED UTERANCE” - EMT ALLOWED TO TESTIFY IN CRIMINAL CASE ABOUT VICTIM’S COMMENTS IN AMBULANCE

On Oct. 29, 2020, in Commonwealth v. Antonio Marrero-Mipanda, the Commonwealth of Massachusetts Appeals Court, held that the trial court properly allowed the EMT to testify at the defendant’s trial, along with the victim. Defendant’s conviction by jury was affirmed for assault with intent to rape and indecent assault and battery on a person fourteen years of age or older.

"Under the excited utterance (or spontaneous utterance) exception to the rule against hearsay, '[a] spontaneous utterance will be admitted in evidence if (1) there is an occurrence or event 'sufficiently startling to render inoperative the normal reflective thought processes of the observer,' and (2) if the declarant's statement was a 'spontaneous reaction to the occurrence or event and not the result of reflective thought' (citation omitted). Commonwealth v. Santiago, 437 Mass. 620, 623 (2002).

***

Here, we have no difficulty concluding that the primary purpose of the victim's statement to the EMT was to assist the EMT in assessing the victim's need for medical care. Each of the three parts of the victim's statement -- that she had been ‘forced up against a wall,’ ‘thrown to the ground,’ and ‘the male's fingers penetrated her vagina’ -- described the application of force to her body in a manner that could have resulted in a need for medical treatment. That the victim herself had not reported or shown signs of vaginal pain or discomfort was beside the point. The EMT asked an open-ended question for the purpose of evaluating what the victim's medical needs might be, and the victim's answer was directly responsive to that question. That the victim might have observed the police handcuffing the defendant and placing him in a cruiser, and that she made the statement to the EMT while the police were still on the scene, did not require the conclusion that she made the statement for the primary purpose of creating an out-of-court substitute for trial testimony, or of otherwise aiding a police investigation.”

Legal Lesson Learned: “Excited utterances” are admissible in trial; EMS should document on the EMS report the victim’s comments.
IL: ET TUBE IN ESOPHAGUS – PATIENT MONITORED DURING TRANSPORT, BUT NO PULSE OX – CASE DISMISSED

On Oct. 26, 2020, in Sally Grant, as Administrator of the Estate of Amanda Gary v. City of Calumet City, the Appellate Court of Illinois (First Judicial District / First Division), 2020 IL App (1st) 191812-U, held (3 to 0) that the trial court properly granted summary judgment to the City. Plaintiff alleged that the medics did not use a pulse oximeter to continuously monitor the patient’s blood oxygen levels after she was intubated, but their Training Officer testified this was not a required action.

“Construing the record liberally in favor of plaintiff (Williams, 228 Ill. 2d at 417), a reasonable finder of fact could conclude that Pierce performed the intubation incorrectly by inserting the tube into Amanda's esophagus rather than her trachea. A finder of fact could also reasonably conclude that this error might have been discovered and fixed prior to Amanda's arrival at the hospital if the paramedics had used a pulse oximeter to continuously monitor Amanda's blood oxygen levels. But even taking these things as true, such errors do not reflect ‘an utter indifference to the decedent's safety’ (Bowden, 304 Ill. App. 3d at 282) as required for a finding of willful and wanton misconduct. This is particularly true where, as here, the paramedics utilized multiple other methods to assess the intubation in a tense and time-sensitive emergency situation.

***

To defeat summary judgment, plaintiff would have had to present evidence that the City either knew [Deputy Fire Chief / EMS Training Officer Peter] Bendinelli's training imperiled patients, or that the City failed to recognize this danger through recklessness. Affatato v. Jewel Companies, Inc., 259 Ill. App. 3d 787, 800 (1994). Plaintiff presented no such evidence. On the contrary, all three of Amanda's treating physicians corroborated Bendinelli’s statement that pulse oximeter readings can be inaccurate. In light of their testimony, plaintiff has not presented an issue of fact as to whether Bendinelli’s training reflects an utter indifference to patients' safety.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZv50h%2Fykh7FShFoRYs3ZTa26w8rY%2BXvT1%2B6dqL4OkZIJK

Legal Lesson Learned: Carefully follow your protocol after placement of ET Tube.

OH: MVA - MEDIC FOUND NO PULSE – 1-HR LATER PATIENT COVERED BLANKET MOVED – NO PROOF “FAILURE TO TRAIN” - CASE DISMISSED

On Oct. 20, 2020, in Lynne Gooden, Individually and as Guardia of Terrell D. Gooden v. Chris Batz, Butler Township, et al., Sharon L. Ovington, United States Magistrate Judge, U. S. District Court for Southern District of Ohio, issued a Report & Recommendation to Federal District Judge that the lawsuit against Butler Township, and against City of Vandalia should be dismissed for alleged “failure to train.” There was no allegation that the Medic who first checked on the patient and found no pulse had a history of similar issues. After an hour at the scene, the same Medic saw Mr. Gooden spontaneously move and discovered he had a weak pulse; he survived with permanent brain damage and other long-term disabling health problems.
“Life-threatening accidents are heartbreaking. Such an accident occurred to Plaintiff Terrell D. Gooden in 2016 when his vehicle collided with a tractor-trailer on Interstate 75. Plaintiffs allege that when Paramedic Chris Batz checked Mr. Gooden's pulse and respiration, he incorrectly concluded that Mr. Gooden had not survived the accident. Batz told other first responders that Mr. Gooden was not alive. And neither Batz nor other first responders immediately attempted to resuscitate Mr. Gooden or provide him with any emergency medical care.

***

The Complaint, for instance, does not allege that Batz made serious mistakes when examining victims of previous accidents that should have alerted Butler Township officials that his training was inadequate and likely to cause harm to accidents victims like Mr. Gooden. And, as to Defendants Gallup and Miller, Plaintiffs' Complaint contains no non-conclusory allegation indicating that they received inadequate training and that such training resulted in a violation of Mr. Gooden's constitutional rights.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZoN7mlr4hHNTnayGEBC4RCM4jvijs5LLDyckRiAx%2Bw

Legal Lesson Learned: Follow your protocols concerning determination of death; ask for a second opinion at the scene.

13-65

MD: 21-YR OLD PATIENT IN BASEMENT, DIFFICULTY BREATHING – ARRIVED 6 MIN – ADMINISTERED NARCAN - IMMUNITY

On Oct. 1, 2020, in Octavia T. Coit, et al. v. Nicole Nappi, et al., the Court of Special Appeals of Maryland, held (4 to 0) that trial court properly dismissed the lawsuit. The 21-year old patient was at a friend’s house and was in the basement having difficulty breathing; history of asthma, died of cardiac arrest. Administration of Narcan was not harmful and did not contribute to the patient’s death. Plaintiffs also complained of a delayed response, but the CAD records show they arrived at scene within 6 minutes and 44 seconds of the 911 call.

“In the absence of willful or grossly negligent conduct, emergency responders covered under the Good Samaritan Act and/or the Fire & Rescue Companies Act are immune from civil liability for any acts or omissions in providing assistance or in the performance of their duties.

***

[Appellants] contend that the administration of Narcan was unnecessary because there was no specific indication that Mr. Coit was experiencing an opioid overdose. The Court understands and appreciates Mr. Coit's family's concern over a misperception that he was using drugs. The evidence demonstrates, however, that, regardless of how unnecessary the administration of Narcan may have been, there are no applicable contraindications for someone who did not overdose on opioids, and that Narcan does not otherwise harm someone to whom it is administered. Even if Paramedic Nappi and EMT Jackson were, in some way, negligent in their assessment and treatment of Mr. Coit, which the Court is not suggesting, there is not
Legal Lesson Learned: Immunity statutes like the Maryland statutes are designed to protect EMS and other emergency responders from civil liability; it is frankly hard to understand why this lawsuit were ever filed.

13-64

NY: LAWSUIT AGAINST EMS – COURT OF APPEALS HOLDS “SPECIAL RELATIONSHIP” – NO GOV’T IMMUNITY

On Sept. 23, 2020, in Rashawn Watts, et. al, v, City of New York, 2020 NY Slip Op 05084, the Supreme Court of the State of New York, Appellate Division (Second Judicial Department) held (4 to 0) that the trial court judge properly denied the City’s motion to dismiss the case, taking the legal position that when EMS provides services to a patient, governmental immunity no longer applies since the City now has established a “special relationship.” [Note: Courts in some other jurisdictions require proof of gross negligence for case to proceed.]

“A municipality will be held to have voluntarily assumed a duty or special relationship with the plaintiff where there is: ‘(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking’ (Applewhite v Accuhealth, Inc., 21 NY3d at 430-431; see Laratro v City of New York, 8 NY3d at 83; Cuffy v City of New York, 69 NY2d 255, 260).’

***

The prehospital care report summaries and computerized automated dispatch report submitted in support of the City defendants' motion did not constitute documentary evidence within the intendment of CPLR 3211(a)(1) (see Santaiti v Town of Ramapo, 162 AD3d at 926; Fontanetta v John Doe 1, 73 AD3d 78, 87).

Legal Lessons Learned: Governmental immunity normally protects the municipality from EMS liability unless proof of gross negligence or willful or wanton misconduct. The case will now proceed to pre-trial discovery.

Note: See Ohio Revised Code 4765.49, Emergency medical personnel and agencies - immunity.

“(A) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful
or wanton misconduct. A physician, physician assistant designated by a physician, or registered nurse designated by a physician, any of whom is advising or assisting in the emergency medical services by means of any communication device or telemetering system, is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's advisory communication or assistance, unless the advisory communication or assistance is provided in a manner that constitutes willful or wanton misconduct. Medical directors and members of cooperating physician advisory boards of emergency medical service organizations are not liable in damages in a civil action for injury, death, or loss to person or property resulting from their acts or omissions in the performance of their duties, unless the act or omission constitutes willful or wanton misconduct.

(B) A political subdivision, joint ambulance district, joint emergency medical services district, or other public agency, and any officer or employee of a public agency or of a private organization operating under contract or in joint agreement with one or more political subdivisions, that provides emergency medical services, or that enters into a joint agreement or a contract with the state, any political subdivision, joint ambulance district, or joint emergency medical services district for the provision of emergency medical services, is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder, EMT-basic, EMT-I, or paramedic, unless the services are provided in a manner that constitutes willful or wanton misconduct.”

13-63 [also filed, Chap. 18]

**OH: TEMPORARY IMMUNITY DURING COVID-19 PANDEMIC – EMERGENCY RESPONDERS, SCHOOLS PROTECTED TORT LIABILITY**

On Sept. 14, 2020, Ohio Governor Mike DeWine signed House Bill 606 into law. “The bill ensures civil immunity to individuals, schools, health care providers, businesses and other entities from lawsuits arising from exposure, transmission or contraction of COVID-19, or any mutation of the virus, as long as they were not showing reckless, intentional or willful misconduct. It also shields health care providers from liability in tort actions regarding the care and services they provide during this pandemic unless they were acting recklessly or displaying intentional misconduct.” [https://www.wkbn.com/news/coronavirus/dewine-signs-law-giving-covid-19-lawsuit-immunity/](https://www.wkbn.com/news/coronavirus/dewine-signs-law-giving-covid-19-lawsuit-immunity/) This will be particularly helpful to FDs that host paramedic and EMS students needing “ride time” for their certifications. See the statute: [https://www.hannah.com/ShowDocument.aspx?BTextID=219206](https://www.hannah.com/ShowDocument.aspx?BTextID=219206)

Legal Lessons Learned: The statute is an excellent example of legislation providing immunity from tort liability during the pandemic for those serving others, including emergency responders.

**TX: “UNRESTRAINED” PATIENT DROPPED FROM STRETCHER – UNEVEN DRIVEWAY – NO EXPERT REPORT**

On Aug. 25, 2020, in City of Houston v. Shirley Houston, the Court of Appeals for the First District of Texas held (3 to 0) that the lawsuit should be dismissed, reversing a trial judge’s denial of City’s motion to dismiss.

“In its sole issue, the City contends that the trial court erred in denying its motion to dismiss because Houston's claim constitutes a health care liability claim and she failed to serve it with a statutorily-required expert report. Here, the allegations in Houston's first amended petition show that her claim is against a health care provider and is based on facts that implicate the defendant's conduct during the course of a patient's care, treatment, or confinement…. Thus, [the Plaintiff] bore the burden of rebutting the presumption that her claim against the City was a health care liability claim…. She has not done so.”


Legal Lessons Learned: When moving a patient on a stretcher from her home the patient must be “secured” to the stretcher and extreme caution must be exercised.

**IL: PRIVATE AMBULANCE – RAN RED LIGHT WHEN DRIVING TO NON-EMERGENCY TRANSPORT - NO IMMUNITY**

On June 18, 2020, in Roberto Hernandez v. Lifeline Ambulance, LLC, et al., the Supreme Court of State of Illinois, held (4 to 3) that the private ambulance driver and his employer are not protected under the state’s EMS immunity statute when the ambulance driver, on a non-emergency run without lights or siren, ran a red light and injured the driver of another vehicle. The ambulance had been dispatched to pick up a patient for nonemergency medical transport from Symphony at Aria Post Acute Care in Hillside to Villa Park Home Dialysis in Villa Park. The Court’s majority held: “The issue presented is whether section 3.150 of the Emergency Medical Services Systems Act (EMS Act) (210 ILCS 50/3.150 (West 2016)) provides immunity from liability—to an ambulance owner and its driver—stemming from a motor-vehicle accident caused by the negligent operation of the ambulance while en route to pick up a patient for nonemergency transportation. We answer this question in the negative, holding that defendants are not immune from liability under the circumstances of this case.”

[https://courts.illinois.gov/Opinions/SupremeCourt/2020/124610.pdf](https://courts.illinois.gov/Opinions/SupremeCourt/2020/124610.pdf)

Legal Lessons Learned: EMS driving running a red light for a non-emergency transport should be held responsible, along with his company, for his negligent conduct.

Note: Three dissenting Justices disagreed:
“In the case at bar, at the time of the accident, Nicholas was rendering nonemergency medical services in the normal course of conducting his duties. Nicholas was in the process of responding to a dispatch to transport a patient to a health care facility. Driving to the patient was preparatory for and integral to delivering the medical service. Further, the accident occurred before transporting the patient to a health care facility and during defendant’s driving in response to the dispatch. Therefore, absent willful and wanton misconduct, section 3.150(a) of the EMS Act immunizes defendants for their alleged negligent acts or omissions while providing nonemergency medical services.”

13-60

MD: EMS GAVE NARCAN TO UNCONSCIOUS 21-YR-OLD –STATUTORY IMMUNITY, NO GROSS NEGLIGENCE – NO HARM

On June 16, 2020, in Octavia T. Coit v. Nicole Nappi, et al., the Court of Special Appeals of Maryland (unreported decision), held that the Paramedic, the EMT, and Baltimore County were all properly dismissed from this lawsuit by the trial judge. The Court ruled: “Paramedic Nappi and EMT Jackson are entitled to statutory immunity based on the Good Samaritan Act and the Fire & Rescue Companies Act because their conduct was neither willful nor grossly negligent. Baltimore County is entitled to governmental immunity under the [LGTCA] because there is no basis for any direct claims against it. *** [Plaintiffs] contend that the administration of Narcan was unnecessary because there was no specific indication that Mr. Coit was experiencing an opioid overdose. The Court understands and appreciates Mr. Coit’s family’s concern over a misperception that he was using drugs. The evidence demonstrates, however, that, regardless of how unnecessary the administration of Narcan may have been, there are no applicable contraindications for someone who did not overdose on opioids, and that Narcan does not otherwise harm someone to whom it is administered. Even if Paramedic Nappi and EMT Jackson were, in some way, negligent in their assessment and treatment of Mr. Coit, which the Court is not suggesting, there is not sufficient evidence of gross negligence regarding their post-arrival conduct.”


Legal Lessons Learned: Finding unconscious 21-year-old in basement, one can understand why EMS used Narcan.

13-59

TX: PARAMEDIC IN BACK OF AMBULANCE – SEVERELY INJURED - OVERWEIGHT TRUCK DUMPED LOAD – MENTAL ANGUISH

On June 4, 2020, in Julio Edwin Martinez; Lone Star Disposal (Texas), LLC; and Lone Star Disposal, L.P. v. Jennifer Kwas, the Court of Appeals for the First District of Texas held (3 to 0) that the civil jury verdict in favor of Paramedic Kwas is affirmed: $1.1 million, including $700,000 for future pain and mental anguish, and $250,000 in punitive damages for gross negligence of Lone Star. A paramedic for 26 year, the mental anguish led her to resign as a medic. The Court wrote: We conclude that the evidence presented at trial supports a conclusion that the jury could have formed a firm belief or conviction that Lone Star was grossly negligent in its training and supervision of its drivers, including Martinez.”

https://www.txcourts.gov/media/1447243/181085f-1.pdf
Legal Lesson Learned: The unrestrained paramedic suffered terrible physical and mental injury; see article on restraint systems for EMS in the back of the box.

Note: Several new restraint products now on the market. For example, see this: “IMMI Launches Per4Max Restraint for EMS Providers (May 3, 2019): An estimated 4,500 ambulances are involved in accidents every year, but 84% of emergency medical technicians do not wear their seat belts because they restrict movement while treating a patient.* IMMI’s Per4Max allows them to reach, stretch, and even stand up in their restraint if necessary. Patient safety is also improved when EMTs buckle up. They remain restrained in an accident and not thrown around the interior of the vehicle, possibly injuring the patient further.”


13-58

NY: PROB. EMT FIRED BY HOSPITAL – POOR AMBUL. CHECKS, COMPLAINTS – APPENDICITIS NOT A “DISABILITY”

On June 1, 2020, in Christopher Vargas v. The St. Luke’s-Roosevelt Hospital Center, U.S. District Court Judge J. Pail Oetken, U.S. District Court for Southern District of New York, granted the Hospital’s motion for summary judgment; the hospital had fired the probationary part-time EMT for not completing ambulance equipment checks, and complaints from co-workers. Prior to being fired to told his manager he had recently had appendix removed; hospital had already made termination decision. The Judge wrote: “Here, the parties agree that ‘[a]s a result of his appendicitis, [Vargas] was hospitalized for only one day, able to return to work after one week, and able to work at ‘full physical activity’ after two months.’ … Vargas's doctor further instructed him he could not engage in heavy lifting during the period in which he was to refrain from ‘full physical activity.’ … Such a short-term impairment, absent long-term impact, is insufficient to qualify as substantially limiting a major life activity, as required to qualify as a disability under the ADA. *** Summary judgment is also warranted on an independent ground: there is no genuine dispute that the decision to terminate Vargas was made before his employer was aware of his appendectomy. The parties agree that Mendoza decided to terminate Vargas in late May or the first few days of June due to his co-workers' complaints and his performance problems. Pl. 56.1 ¶ 59 (citing RM Tr. 27) (“At some point in late May or the first few of days of June 2015, Mendoza decided that Vargas should not pass probation and that he should be terminated because of the co-worker complaints and Vargas's poor performance.”). The parties also agree that Defendants did not become aware of Vargas's appendectomy until June 5, 2015. Id. ¶ 68 (citing RM Tr. 27; Mendoza I Decl. ¶ 2(a)). Because the decision to terminate Vargas was made before Defendants were aware of his appendectomy, the evidence fails to support a causal relationship necessary to prevail on either a failure to accommodate or discrimination claim under the ADA.

https://public.fastcase.com/Wl%2Bt%2BeVuI35%2FN70vAMFZpHUgoz3hp5Nx0V5b99AFirO%2BO19k2h0p4CgWny%2Fxn0a

Legal Lessons Learned: Probationary employee not covered under the Collective Bargaining Agreement; ADA does not apply to short-term illness such as appendicitis.
Note: Congress in 2008 broadened the coverage under Americans With Disabilities Act, overturning two U.S. Supreme Court decisions, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). The EEOC has promulgated administrative rules that guide the analysis of whether a temporary impairment is sufficiently severe to qualify as a disability under the ADA. 29 C.F.R. § 1630.2(j)(1)(ix) (app.). Those regulations state that “if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability.”

13-57

U.S. SUPREME COURT – CARONA VIRUS – UPHOLDS CALIFORNIA RESTRICTIONS ON RELIGIOUS GATHERINGS

On May 29, 2020, in *South Bay United Pentecostal Church, et a. v. Gavin Newsom, Governor of California*, the Court (5 to 4) denied the church’s request for an injunction, in a rare late-night ruling, and upheld the California restriction of attendance at places of worship to 25% of building capacity, or a maximum of 100 attendees. The San Diego area church had lost before a U.S. District Court judge, and also the 9th Circuit.

[https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf](https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf)

Legal Lessons Learned: There has been litigation throughout the nation challenging corona virus restrictions; this is the first case to reach the U.S. Supreme Court.

Note: On May 6, 2020, the U.S. Supreme Court declined to hear an appeal by PA businesses seeking an injunction. The Court will not hear an appeal unless at least 4 Justices agree to hear case. See article: “U.S. Supreme Court rejects request to end Pennsylvania's coronavirus lockdown.”


13-56

NJ: MAINTENANCE ISSUES OF EMS VEHICLES – STATE SUSPENDS LICENSE – INSTEAD OF ADMIN. APPEAL, WENT TO COURT – COURT OF APPEALS UPHOLDS SUSPENSION
On May 27, 2020, in Americare Emergency Medical Service, Inc. v. City of Orange Township; State of New Jersey Department of Health, Office of EMS, et al., the Superior Court of New Jersey Appellate Division, held (3 to 0) in unpublished decision that the State’s suspension is reinstated; they must exhaust administrative appeal to Commissioner of Dept. of Health.  https://njcourts.gov/attorneys/assets/opinions/appellate/published/a0117-19.pdf?c=WwB

Legal Lessons Learned: Proper maintenance of EMS transport vehicles is extremely important; it is generally best to exhaust administrative appeals before going to Court.

13-55

NY: DIFFICULTY BREATHING CALL - RAPID PD RESPONSE, BUT 20 MINUTES MUTUAL AID AMBULANCE - GOVERNMENTAL IMMUNITY - NO “SPECIAL DUTY” OWED

On May 27, 2020, in Kathlene Marks-Barcia v. Village of Sleepy Hollow Ambulance Corps, et al., the Supreme Court of New York, Appellate Division (Second Judicial Department), held (3 to 0) that the trial judge properly granted summary judgment to the Village since they owed no “special duty” to the 911 caller or her husband.  https://iapps.courts.state.ny.us/search/wicket/page?2-IResourceListener-pnlResultContainer-pnlResult-2-lnkDocument

Legal Lessons Learned: Governmental immunity is an important protection against liability for EMS.

Note: Some states, such as Florida, have by statute abolished the “Professional Rescuer Rule” [also known as “Fireman’s Rule”]. See Florida 2019 statute:  http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0112/Sections/0112.182.html

13-54

IL: TRANSP. FEMALE FROM PD TO HOSPITAL - KICKED PARAMEDIC IN NECK – CONVICTED BY JURY AGGRAVATED BATTERY – VIDEO FROM HOSPITAL / PHOTO OF MEDIC’S BRUISED NECK – SENTENCED 2 YEARS IN PRISON

On May 13, 2020, in The People of State of Illinois v. Krystina Stoch, the Appellate Court of Illinois, First District, held (3 to 0) that conviction of aggravated battery was affirmed, and rejected the defense that she didn’t intend to
hurt the paramedic when she kicked out at him when being moved from stretcher to a wheelchair at the hospital.

https://courts.illinois.gov/R23_Orders/AppellateCourt/2020/1stDistrict/1172189_R23.pdf

Legal Lessons Learned: The hospital video, and photo of the paramedic’s bruised neck, were shown to the jury.

13-53

NY: PATIENT LEG PAIN, FLUID – EMS ADVISED SEE HER DOCTOR IN MORNING – SIGNED “RMA” REFUSAL MEDICAL ASSISTANCE – DIED 6 DAYS LATER - IMMUNITY

On May 5, 2020, in Anthony L. Pioli, Administrator Estate of Anna Pioli v. New York City Fire Department et al., Judge Rosemarie Montalbano, Supreme Court of the State of New York, County of Kings: Part 22, dismissed the lawsuit since the EMTs did not owe a “Special Duty” to the patient. In addition, “The decedent signed the RMA [Refusal of Medical Assistance] expressly stating that she did not want to be transported to the hospital.”

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZmo%2BcULZ%2FcXakIqGXvRrcFyKri8LBojVsP%2FOvCVPfk0

Legal Lessons Learned: The Special Duty doctrine helps protect EMS and their employers from liability. If patient is complaining of leg pain and using fluid, consider a call to Medical Control at the hospital.

13-52

NM: CORONA VIRUS – MEGA CHURCH CHALLENGED LIMIT OF 5 PEOPLE – DENIED TEMPORARY RESTRAINING ORDER

On April 17, 2020, in Legacy Church, Inc. v. Kathyleen M. Kunkel and State of New Mexico, U.S. District Court Judge James O/ Browning denied the church’s motion for temporary restraining order. Legacy Church has nearly 20,000 members, with church services held in four locations in Albuquerque. Kathyleen M. Kunkel is New Mexico’s Secretary of Health Department; on March 24, 2020, Secretary Kunkel issued the Public Health Order, which ordered all non-essential businesses to close, ordered all of the state's non-essential workforce to work from home, and ordered New Mexico citizens to ‘stay at home and undertake only those outings absolutely necessary for their health, safety, or welfare.’

“The Court denies the Motion. The Court concludes, first, that the Eleventh Amendment prohibits Legacy Church’s suit insofar as it seeks relief against the state of New Mexico. Second, the Court concludes that Legacy Church is not substantially likely to succeed on the merits of its Free Exercise claim. Specifically, the April 11 Order is both neutral and generally applicable, and there is no evidence of animus against Christianity in particular or against religion in general. Accordingly, the April 11 Order is subject to rational basis review, which it satisfies. Third, the Court concludes that Legacy Church is not likely to succeed on its
assembly claim, because the April 11 Order not only is narrowly tailored with sufficient alternatives for Legacy Church to assemble and mitigating a state pandemic is a compelling interest. Fourth, the Court concludes that Legacy Church has not demonstrated that it will suffer irreparable harm in a TRO's absence, it has not demonstrated that the equities weigh in a TRO's favor, and it has not demonstrated that a TRO is in the public interest. Accordingly, the Court denies the TRO. … Footnote 16: The Court does not want its Memorandum Opinion to be read to minimize the importance of faith in people's lives. Certainly religion is the centerpiece of many people's lives, and many individuals may feel as if religion saved their life. But essential services focus on the public as a whole -- essential businesses are essential for the lives of everyone, because they are necessary to ensure public health and welfare.”

Legal Lessons Learned: Public health and welfare prevails over a church’s desire to hold large gatherings.

Note: See this April 26, 2020 article, “Breaking: Church, Louisville, KY Mayor Reach Agreement in Dispute Over Drive-in Church Services,” https://firstliberty.org/media/breaking-church-louisville-ky-mayor-reach-agreement-in-dispute-over-drive-in-church-services/

13-51

NJ: RETALIATION - EMS SUPERVISOR FIRED – WOULD NOT GIVE FALSE INFO ON EMT SUING HOSP. FOR SEX HAR.

On April 14, 2020, in Emiliano Rio v. Meadowlands Hospital Medical Center, the Superior Court of New Jersey, Appellative Division, held (3 to 0) that the trial court judge improperly granted the hospital’s motion for summary judgement; the EMS Supervisor’s retaliation lawsuit may now proceed to trial.

“Based on our review of the record, we are convinced the motion court erred in its determination plaintiff did not present sufficient evidence establishing the good faith and reasonable basis prerequisite for a LAD retaliatory discharge claim established by our Supreme Court in Carmona v. Resorts International Hotel, Inc., 189 N.J. 354, 372 (2007), and we reverse and remand for further proceedings….The facts proffered by plaintiff, which we accept as true for our analysis of the court's disposition of the summary judgment motion, show defendant attempted to retaliate against Bailey for the filing of her LAD complaint. Following the filing of [Ms.] Bailey's [sexual harassment] complaint, defendant requested plaintiff file a baseless complaint for a restraining order against Bailey; conjure up false complaints about Bailey; and make false statements about her. Those requests constitute an attempt by defendant to commit ‘an unlawful employment practice’ in violation of N.J.S.A. 10:5-12(d)—retaliation against Bailey for her filing of a sexual harassment complaint.” https://njcourts.gov/attorneys/assets/opinions/appellate/published/a3846-18.pdf?c=Npo

Legal Lessons Learned: Employers sued for sexual harassment must be extremely careful in discussions with employees about their dealings with the plaintiff. It is often best to leave this to legal counsel.
PA: CORONA VIRUS – POL. CANDIDATE, REAL ESTATE AGENT, GOLF COURSE SHUT DOWN - TRO DENIED

On April 13, 2020, in Friends of Danny Devito, et al. v. Tom Wolf, Governor, Supreme Court of Pennsylvania, Middle District, the Court held (4 to 3), that Governor lawfully declared an Emergency, and he could shut down their businesses: Candidate for PA House of Representatives; real estate agent; public golf course and restaurant.

“Petitioners are four Pennsylvania businesses and one individual seeking extraordinary relief from Governor Wolf’s March 19, 2020 order (the ‘Executive Order’) compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease (‘COVID-19’). The businesses of the Petitioners were classified as non-life-sustaining…. Petitioners suggest that the public interest would best be served by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.

http://www.pacourts.us/assets/opinions/Supreme/out/68MM2020mo%20-%202010439399799476700.pdf?cb=1

Legal Lessons Learned: Governor has broad emergency powers under State statutes.


KS: CORONA VIRUS – STATE LEGISLATIVE COMMITTEE CAN’T OVERRULE GOVERNOR’S LIMITS 10 PEOPLE

On April 11, 2020, in Governor Laura Kelly v. Legislative Coordinating Council, Kansas House of Representatives, and Kansas Senate, the Kansas Supreme Court held (7 to 0) that the Legislative Council cannot revoke an Executive Order of the Governor. On April 8, the LCC convened pursuant to HCR5025. By 5-to-2 vote, it revoked Executive Order 20-18.

“On April 7, Governor Kelly used her K.S.A. 2019 Supp. 48-925(b) powers to issue Executive Order 20-18, relating to her March 12 emergency proclamation. Among other things, it temporarily prohibited, subject to several exemptions, ‘mass gatherings,’ defined as ‘any planned or spontaneous, public or private event[s] or convening[s] that will bring together or [are] likely to bring together more than 10 people in a confined or enclosed space at the same time.’ Executive Order 20-18 rescinded and replaced an earlier, substantially similar executive order. But Executive Order 20-18 differed in that it removed ‘[r]eligious gatherings’ and
‘[f]uneral or memorial services or ceremonies’ from the list of ‘activities or facilities’ exempt from the temporary prohibition of mass gatherings…. The Court has considered and grants in part the Governor’s Petition in Quo Warranto. The LCC's purported revocation of Executive Order20-18 on April 8 was a nullity, because the LCC lacked authority do so under HCR5025's terms.”

https://www.kscourts.org/KSCourts/media/KsCourts/Opinions/122765.pdf

Legal Lessons Learned: A Legislative Committee does not have power to overturn Governor.


13-48

TX: EMS CHECKED OUT OVERDOSE PATIENT AT SCENE – HIT HIS HEAD 40+ POLICE CRUISER GOING JAIL – DIED - EMS IMMUNITY, NOT PD

On April 9, 2020, in Kathy Dyer & Robert Dyer v. Richard Houston, et al., the U.S. Court of Appeals for the 5th Circuit (New Orleans), held (3 to 0) that the U.S. District Court judge properly granted the paramedics’ motion to dismiss on the basis of qualified immunity; there was no proof of “deliberate indifference.” Court, however, reinstated the lawsuit against the police officers since patient hit his head over 40 times in the back seat of a police cruiser.

“We agree with the district court that the Dyers’ complaint fails to allege facts that plausibly show the Paramedics’ deliberate indifference. The thrust of the complaint is that, after examining Graham [Dyer] and observing his head injury and drug-induced behavior, the Paramedics should have provided additional care—such as sending Graham to the hospital, accompanying him to jail, providing ‘further assessment or monitoring,’ or sedating him. At most, these are allegations that the Paramedics acted with negligence in not taking further steps to treat Graham after examining him. Our cases have consistently recognized, however, that ‘deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm.”” http://www.ca5.uscourts.gov/opinions/pub/19/19-10280-CV0.pdf

Legal Lessons Learned: Qualified immunity is an important legal protection for emergency responders, but it is not “absolute” immunity.

Note: Lawsuit against police officers will proceed. Court wrote: “By contrast, in this case a reasonable jury could find that (1) Graham violently bashed his head against the interior of Officer Heidelburg’s patrol car over 40 times while en route to jail; (2) Officers Heidelburg, Gafford, and Scott were fully aware of Graham’s actions and of their serious danger; (3) the Officers sought no medical attention for Graham; and (4) upon arriving at jail, the Officers failed to inform jail officials what Graham had done to himself, telling them only that Graham had been ‘medically cleared’ at the scene. From this evidence, a reasonable jury could conclude that the Officers ‘were either aware or should have been aware, because it was so obvious, of an unjustifiably high risk to [Graham’s] health,’ did nothing to seek medical attention, and even misstated the severity of Graham’s condition to those who could have sought help.”
CA: CORONA VIRUS – LOS ANGELES MAYOR SHUTS DOWN GUN SHOPS – GOVERNOR / SHERIFF HAD NOT - TRO DENIED

On April 6, 2020, in Adam Brandy v. Alex Villanueva, et al., U.S. District Court Judge Andrew Birotte, Jr. held that Los Angeles Mayor Eric Garcetti has the power to shut down gun stores as non-essential businesses in the city. The Governor on March 19, 2020 had issued an order that left the decision on gun shops to County Sheriffs. On March 24, 2020, Sheriff Villanueva of LA County ordered all gun shops closed, but he later changed his opinion and declared them an essential business. Federal judge denied gun shop owners’ motion for a Temporary Restraining Order.

“Moreover, because this disease spreads ‘[a]n affects person coughs, sneezes or otherwise expels aerosolized droplets containing the virus,’… the closure on non-essential businesses, including firearms and ammunition retailers, reasonably fits the City’s and County’s stated objective of reducing the spread of this disease. Plaintiffs fail to demonstrate a likelihood of success on the merits of the Second Amendment claim against the County and City orders.”

Legal Lessons Learned: TRO denied since Mayor’s orders are based on emergency.

Note: See April 14, 2020 article on LA Superior Court judge’s decision, forcing gun stores to remain closed, “Coronavirus: Judge upholds LA city order to close gun stores,”

FL: DEPUTY SHERIFF ORDERED CPR STOPPED – HANGING - LAWSUIT TO CONTINUE, NO QUALIFIED IMMUNITY

On March 25, 2020, in Jolene Waldron v. Gregory Spicher, Deputy, the U.S. Court of Appeals for Eleventh Circuit (Atlanta), held (3 to 0) that the trial court properly denied Deputy Sheriff’s motion to dismiss the case based on qualified immunity. The lawsuit may proceed, but mother of the deceased has very difficult burden to proving to a jury that the Deputy was not only reckless, but that he intended to cause death of her son.
Several minutes later, a fire truck and an ambulance arrived. Three paramedics—later identified as David Warren, Christensen, and Grisales—attempted to attend to Ybarra, but Spicher only allowed Warren to do so to ‘confirm the patient’s status.’ Warren testified that Spicher told him to ‘not touch the patient very much because this was . . . a crime scene.’ Warren noted that Ybarra was ‘severely cyanotic and unresponsive’ and his neck was elongated. He assessed Ybarra with a Glasgow Coma Score of one in eyes, verbal, and motor, which was consistent with a deceased person’s score. Warren hooked up Ybarra to a heart monitor and noted a heart rate of 24 beats per minute, which he testified indicated organized electrical activity in the heart inconsistent with death. Warren called for Spicher to retrieve Lieutenant Christensen, but Spicher was on the phone and did not hear him, so Warren shouted louder, which finally brought Christiansen over. The two immediately recontinued CPR and began ‘manual C-spine immobilization,’ which was meant to hold Ybarra’s spine in line. Ybarra was then transported to the hospital, where he died a week later.

***

In this opinion, we have held that…Waldron cannot demonstrate that Spicher violated clearly established substantive due process rights without proving more than that Spicher acted with deliberate indifference or recklessness. But we have also held that, if the jury should find that Spicher acted for the purpose of causing harm to Ybarra, Waldron would have proved a violation of clearly established substantive due process rights.”

Legal Lessons Learned: Terrible conduct by Deputy Sheriff, but plaintiff must now prove Deputy intended to harm the victim. Hopefully this case settles prior to jury trial.

13-45

IL: OFF-DUTY PARAMEDIC - IN HOT TUB WITH FEMALE - SHE INJURED HEAD WHEN SLIPPED BATHROOM – CANNOT SUE CITY

On Feb. 28, 2020, in Kylie Didonato v. Tim Panatera and City of Chicago, U.S. District Court Judge Virginia M. Kendall, Northern District of Illinois (Eastern Division), granted the motions to dismiss by the paramedic and the city.

“As this Court noted before, DiDonato's claim is that Panatera failed to do anything more than wrap her head in a towel and that he denied her proper medical care by failing to call 911 or taking her to a hospital for emergency care. (Dkt. 37 at 10; Dkt. 51 at 4; Dkt. 52 at 3). This inaction, as DiDonato has alleged it, relates more to Panatera's role as a bystander than a paramedic, and actions unrelated to a state actor's official duties are not taken under color of law.”

Legal Lessons Learned: The Court had previously given plaintiff and opportunity to file an amended complaint: Aug. 20, 2019: https://casetext.com/case/didonato-v-panatera. The case may now go back to State court on her claims against the paramedic (not the city) for negligence, assault, battery, and willful and wanton misconduct.
NC: PARAMEDIC FIRED – ET TUBE PLACEMENT, MEDS – EMS BOARD REDUCED TO EMT-B – NOT RACE DISCRIMINATION

On Feb. 11, 2020, in Danny Cade v. County of Bladen, U.S. District Court Judge Louise W. Flannigan, Eastern District of North Carolina (Western Division), granted the County’s motion for summary judgment, dismissing the race-discrimination lawsuit.

“Defendant meets its burden by coming forward with legitimate nondiscriminatory reasons for plaintiff’s suspension and termination. Bowman testified that, on January 27, 2017, plaintiff failed properly to use an endotracheal tube to help the patient breathe. (Bowman Dep. (DE 40-3, 43-3) 41:5-43:15, 48:16-49:10, 52:6-25). Bowman asked if any medication had been given, plaintiff responded he had administered two epinephrine pills, though all the epinephrine pills were still in the bag. (Bowman Dep. (DE 40-3, 43-3) 43:16-44:4, 48:9-15). Bowman testified that plaintiff failed properly to take a diagnostic of the patient's heart. (Bowman Dep. (DE 40-3, 43-3) 46:14-22, 59:1-11). Singletary, who was also on the call with plaintiff, and Bowman both filed reports identifying deficiencies in the care administered by plaintiff to the patient. (Cade Dep. (DE 40-2) Ex. 12, 13). *** A peer review committee was convened to review the call and determined that a state investigation was necessary regarding whether plaintiff failed to follow proper treatment protocol, negligently performed his duties, and falsified patient records. (Cade Dep. (DE 40-2) Ex. 15). Defendant suspended plaintiff without pay pending investigation of these issues by the state, and it explained that plaintiff’s continued employed with the state would be contingent on the state findings of investigation. (Cade Dep. (DE 40-2) Ex. 15, 16). The state investigation [by North Carolina Office of Emergency Medical Services] found numerous deficiencies in plaintiff’s performance on the job, determined that plaintiff falsified details of the call, and revoked plaintiff’s EMT-P credential. (Cade Dep. (DE 40-2) Ex. 20). Relying on the same factual findings as the state, defendant terminated plaintiff’s employment for violating county policy. (Cade Dep. (DE 40-2) Ex. 21, 22).”

Legal Lessons Learned: The EMS Department properly notified State EMS Board of serious violations of protocol; suspended Medic and awaited state investigation before terminating the Medic.

TN: COMBATIVE PATIENT – PD RESTRAINED PATIENT - EMS USED SUCCINYLCHOLINE – QUALIFIED IMMUNITY, FOLLOWED PROTOCOL
On Jan. 21, 2020, in Estate of Dustin Barnwell v. Mitchell Grigsby, et al., the U.S. Court of Appeals for the Sixth Circuit (Cincinnati, OH) held 3 to 0 that the U.S. District Court judge, after three days of trial before a jury, properly dismissed the lawsuit against police and paramedics.

“Our three days of trial, the district court found that the defendants’ entitlement to qualified immunity resolved the ultimate issue in the case: whether administration of succinylcholine to Barnwell constituted constitutionally-impermissible excessive force. The district court properly viewed the evidence in the light most favorable to Gilmore and found that there was no legally sufficient basis fora reasonable jury to find for Gilmore on the ultimate issue in the case.” [link](https://cases.justia.com/federal/appellate-courts/ca6/18-5480/18-5480-2020-01-21.pdf?ts=1579627818)

Legal Lessons Learned: Thoroughly document details about the combative patient, and protocol on meds administered was followed.

13-42

**GA: EMT – OBJECTED WHEN TOLD TO FALSIFY PATIENTS CAN’T WALK – LATER FIRED, DIDN’T INFORM DIR. 2nd EMS JOB – NO RETALIATION**

On Jan. 3, 2020, in Jamie Nesbitt v. Chandler County, GA, d.b.a. Chandler County Ambulance Service, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held 3 to 0 that the U.S. District Court judge properly dismissed the EMT’s False Claims Act lawsuit claiming retaliation. He was fired for having an undisclosed second job working for a private ambulance company; no proof that “but for” his being a whistleblower he would have been fired.

“According to Nesbitt, when Greer became the deputy director he started pressuring the EMTs to write in their report narratives that patients were unable to walk, even if they could. That way Medicare would pay for more trips. Nesbitt believed that Greer was asking him to commit fraud, so he began complaining to Greer himself and other County officials. *** The County had a policy prohibiting EMTs from working side jobs without the approval of the ambulance service director. Greer was not the director, David Moore was. Nesbitt assumed that Moore somehow knew about his other job, but there’s no evidence that Moore did know about it, much less that he approved it.” [link](http://media.ca11.uscourts.gov/opinions/pub/files/201814484.pdf)

Legal Lessons Learned: Employer had basis for termination.

13-41

**FL: HIGH SCHOOL FOOTBALL – HEAT EXHAUSTION / DIED - COACH DELAYED CALLING 911 – NO LIABILITY, LACK REQUISITE CONTROL**
On Jan. 2, 2019, in *Laurie Alice Giordano v. The School Board of Lee County, Florida and James Delgado*, U.S. District Court Judge John E. Steele, U.S. District Court, Middle District of Florida (Fort Myers Division), granted defendants motion to dismiss.

“Mere compulsory attendance at a public school does not give rise to a constitutional duty of protection under the Due Process Clause because public schools generally lack the requisite control over children to impose such a duty of care upon these institutions.” [https://ecf.flmd.uscourts.gov/cgi-bin/show_public_doc?2019-00439-60-2-cv](https://ecf.flmd.uscourts.gov/cgi-bin/show_public_doc?2019-00439-60-2-cv)

Legal Lesson Learned: Football and other athletic coaches need training in signs of serious illness, and need to promptly call 911.

13-40

**TX: POTHOLE - MOTORCYCLIST INJURED – DIDN’T INFORM CITY OF POTHOLE - EMS RUN RPT. NOT “ACTUAL NOTICE” – CASE DISMISSED**

On Dec. 31, 2019, in *City of Houston v. Elvin D. Miller*, the Court of Appeals for the First District of Texas, held (3 to 0) that the trial judge should have dismissed this lawsuit.

“Accordingly, we hold that Miller has not demonstrated that the City was subjectively aware of its fault in producing or causing his injuries such that it had actual notice of his claims prior to the jurisdictional deadline for giving notice of his claims.” [https://cases.justia.com/texas/first-court-of-appeals/2019-01-19-00450-cv.pdf?ts=1577798110](https://cases.justia.com/texas/first-court-of-appeals/2019-01-19-00450-cv.pdf?ts=1577798110)

Legal Lessons Learned: If EMS respond to serious accident and patient advises it was caused by pothole, notify the city immediately of the pothole so it can be filled and similar injuries avoided.

13-39

**LA: PARAMEDIC LETTER TO BOARD – NEED POLICY CHANGES – FIRED 19 MOS. LATER – FALSIFYING TRAINING RECORDS – NO RETALIATION**

On Dec. 17, 2019, in *Patrick A. Benefield; Brian Scott Warren v. Joe D. Magee*, the U.S. Court of Appeals for the 5th Circuit (New Orleans) held (3 to 0) that 19-month gap too long; no retaliation.

“The issues, therefore, are (1) whether Warren’s speech was on a matter of public concern and (2) whether his June 2015 letter was a substantial or motivating factor for his firing. We agree with Magee [EMS Manager] that Warren failed to allege a sufficient causal connection between his letter and his firing…. Warren sent his letter in June 2015 and was fired in January 2017—a 19-month gap…. Thus, the timing, by itself; between Warren’s speech and his firing is not close enough to permit a plausible inference that Warren’s firing was causally connected to his speech.” [https://cases.justia.com/federal/appellate-courts/ca5/18-30932/18-30932-2019-12-17.pdf?ts=1576629071](https://cases.justia.com/federal/appellate-courts/ca5/18-30932/18-30932-2019-12-17.pdf?ts=1576629071)
Legal Lessons Learned: The EMS Manager won his interlocutory appeal and he is now dismissed from the lawsuit.

13-38

**WV: DRAG RACING / SON EJECTED – MOTHER RN / FLIGHT NURSE - PD STOPS HER CARE SON; MEDICS DIDN’T TAKE PULSE – CASE PROCEED**

On Dec. 5, 2019, in Amy Brown, individually and Administratrix of the Estate of James Brady Leonard v. Mason County Commission, Gallia County Board of Commissioners, et al., U.S. District Court Judge Robert Chambers, Southern District of West Virginia (Huntington Division), the lawsuit against the Deputy Sheriff may proceed.

“Taken as true, the conduct [by County Deputy Sheriff] alleged here is certainly more than ‘merely annoying’ or ‘uncivil.’ A jury could very well determine that physically restraining a mother attempting to provide medical assistance to her son is utterly intolerable in a civilized community. See Travis, 504 S.E.2d at 425. It would be similarly reasonable for a jury to determine that Bryant acted recklessly, that his actions caused Plaintiff to suffer emotional distress, and that her distress was so severe that no reasonable person could be expected to endure it. It follows that Plaintiff has pleaded sufficient facts to state a claim for relief under an [Intentional Infliction of Emotional Distress] theory.

***

Gallia County EMS is not entitled to dismissal. As discussed in the preceding section, Plaintiff alleges that Elliott and Turner—both Gallia County EMS responders—did not check Leonard's pulse, his breathing, or his body for injuries, and that they pronounced him dead without following proper procedures.”

[https://public.fastcase.com/Wi%2B2t%2BeVuI35%2FN70vAMFZg2lBBReDY5nF88uy08v8DAnqlL%2F22Z9bDzSjQpTYH Ou](https://public.fastcase.com/Wi%2B2t%2BeVuI35%2FN70vAMFZg2lBBReDY5nF88uy08v8DAnqlL%2F22Z9bDzSjQpTYH Ou)

Legal Lessons Learned: The lawsuit will now proceed; hopefully the EMS run report by the two Gallia County EMS reflects they followed their protocol prior to deciding the victim was dead at the scene.

13-37

**OH: EMS RUN REPORT – DRIVER ADMITTED DRINKING WINE – TWO MEDICS TESTIFIED IN VEHICULAR HOMICIDE TRIAL**

On Nov. 15, 2019, in State of Ohio v. Kathy J. Smith, the Court of Appeals of Ohio, Second Appellate District (Greene County) held (3 to 0) that defendant’s appeal is denied, and she must continue to serve her seven-year sentence for aggravated vehicular homicide.
“On appeal, Smith argues that her statements to the paramedics about drinking were analogous to the written record of those statements in the EMS run sheet. But regardless of whether the run sheet itself might or might not qualify by statute as a ‘medical record,’ we are unpersuaded that the Fourth Amendment precluded Meadows from speaking to the paramedics without a warrant and hearing what Smith told them about consuming alcohol. The trial court correctly found that Smith was not in law-enforcement custody when she made her voluntary statements in response to the paramedics' questions. We note too that Smith's statements were not entitled to a statutory privilege.”

Legal Lessons Learned: EMS should record on EMS Run Report comments by patients about drinking alcohol prior to the accident, and other culpable admissions.

13-36

IN: OPERATOR PRIVATE AMBUL. CO. INDICTED – DIALYSIS PATIENT TRANSPORTS – IMPROPERLY BILLED MEDICARE

On Nov. 15, 2019, in United States v. Basil Ubanwa, U.S. District Court of Northern District of Indiana, Chief Judge Theresa L. Springmann denied defense motion to dismiss the indictment.

“[FBI] Agent Pawelko testified as follows: Based on—based on the people we had spoken to and the things we've reviewed, it does appear that, number one, the majority of people that Northwest was transporting during the time of our investigation were patients being transported to and from dialysis, which is a form of - it's a nonemergency transportation. And so far, what we've seen does support the allegation that they are transporting patients who do not qualify for this type of transportation. There's many indicators that these patients are capable of being transported to dialysis and other places by different means.

***

Carlos Trevino, an Emergency Medical Technician and employee of Northwest Ambulance, was then called to testify before the Grand Jury. Ex. C, pp. 2, 5-6, ECF No. 25-3. In essence, Trevino testified that the Defendant directed his employees to alter and fabricate documents so that Medicare would reimburse Northwest Ambulance for transporting patients who did not qualify for ambulance transportation. See, e.g., id. at 12, 24-27, 44-45, 52. The Prosecutor also discussed various patients that Northwest Ambulance had transported, and Trevino offered his opinion on whether those patients qualified for transport under the applicable Medicare regulations. Id. at 29, 31, 34. The Prosecutor also asked Trevino the following question: "how many millions of dollars was paid out by Medicaid for the transportation of [the] patients?" Id. at 54. Trevino responded that he did not know. Id. The Prosecutor then asked a follow up question: "Would it surprise you to know it's 3 or 4 million dollars?" Id. Trevino answered, "That is surprising, yes." Id.

https://public.fastcase.com/W%2B2t%2BeVuI35%2FN70vAMFZl8DDiJ0itZyM%2FaRiHEaOXnxs5Y VKmrc22QWJLh0q
Legal Lessons Learned: Federal government continues widespread investigation of Medicare fraud. [https://oig.hhs.gov/fraud/strike-force/] “First established in March 2007, Strike Force teams currently operate in the following areas: Miami, Florida; Los Angeles, California; Detroit, Michigan; Houston, Texas; Brooklyn, New York; Baton Rouge and New Orleans, Louisiana; Tampa and Orlando, Florida; Chicago, Illinois; Dallas, Texas; Washington, D.C.; Newark, New Jersey/Philadelphia, Pennsylvania; and the Appalachian Region.”

13-35

NY: UNCONSCIOUS PATIENT – 37 MIN. DELAY - PD RE-DIRECTED TO ANOTHER PATIENT – PATIENT DIED - LAWSUIT MAY PROCEED

On Nov. 7, 2019, in Michael Mannino, as Administrator of the Estate of Carmen Mannino v. The City of New York, Supreme Court of New York, New York County (Part 5), Justice Verna L. Saunders, denied the City’s motion for summary judgment.

“Moreover, it is clear from the facts presented that reasonable minds may differ as to whether the dispatcher made the appropriate inquiries in order to dispatch the most suitable unit to plaintiff's home; whether the thirty-seven minutes that elapsed between Mr. Mannino's first 911 call and FDNY's ultimate arrival to his home constitutes a breach of duty where Mr. Mannino called 911 three times and was never informed that there was a delay due to the initial ambulance being stopped by NYPD; and finally, whether plaintiff’s reliance on the statements of the dispatcher was reasonable where on three separate occasions he informed the 911 of dispatch of his wife's condition and each time was told that ‘they will take care of it.’ The City's assertion in reply, that plaintiff did not report to the dispatcher his wife's "deteriorating" condition is without merit as it is the dispatcher who elicits relevant information through questioning. Furthermore, the information provided to the dispatcher over the course of the multiple 911 calls resulted in plaintiff's priority increasing with each call, with the final call being given top priority and an ALS unit assignment. [https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZi1T3lhea37qRbZrbVg21pm1BEJfSmxcdX46bLXGGvU2]

Legal Lessons Learned: If an ambulance is re-directed on another run, dispatch should inform the 911 caller of the delay.

13-34

MD: CARDIAC RUN - PATIENT WALKED TO AMBULANCE, TO WHEELCHAIR - $3.7M JURY REVERSED - NOT “GROSS NEGLIGENCE”

On Aug. 16, 2019, in Joseph Strackle, et al. v. Estate of Kerry Butler, Jr., the Maryland Court of Appeals (4 to 3), reversed the Court of Special Appeals, and agreed with the trial judge that the paramedics were not grossly negligent. Plaintiff alleged breach of City of Baltimore FD protocol when the patient walked from his home to the ambulance, and upon arrival at hospital walked from ambulance to wheelchair. The jury verdict of $3,707,000 was
set aside by the trial judge, but reinstated by the Special Court of Appeals; the paramedics appealed to Maryland Court of Appeals, which set aside the jury verdict.

“Petitioners [paramedics] assessed the patient, took his vitals, and promptly transported him to the nearest hospital within approximately seven minutes of first arriving on the scene. Based on the evidence presented at trial, the jury could not have found that Petitioners were grossly negligent by a preponderance of the evidence. We further conclude that Cts. & Jud. Proc. § 5-604(a) unambiguously confers immunity upon municipal fire departments in simple negligence claims. *** Finally, the practical implications of holding otherwise cannot be overstated. Concluding that Petitioners were grossly negligent would have a negative impact on not only the number of individuals who seek employment as first responders in the future, but would create a chilling effect on their conduct. First responders must have broad discretion to proceed in their assessment and treatment of patients without the fear of liability. *** We conclude that there was not sufficient evidence to establish that Petitioners [paramedics] committed gross negligence. The mere fact that Petitioners inaccurately diagnosed and treated their patient does not elevate their conduct to gross negligence.


Legal Lessons Learned: Follow your Protocols, and on cardiac run if the patient will not wait to get on the cot, or upon arrival at hospital insists on walking out of the ambulance to the wheelchair, thoroughly document the facts.

13-33

LA: BLACK EMS CAPT. – NITROGLYCERIN WAS FOR MOUTH, NOT CHEST – SUSPENSION / REMEDIATION PROPER - NOT RACE / GENDER

On Sept. 17, 2019, in Deborah Mills v. City of Shreveport, U.S. District Court Judge Terry A. Doughty, U.S. District Court of Louisiana, Western District, Shreveport Division, dismissed her claim of “hostile work atmosphere.” He had previously dismissed her race and gender discrimination claims.

https://scholar.google.com/scholar_case?case=2959279778538737103&hl=en&as_sdt=6,36

“While Mills may subjectively believe that she has been treated differently and more harshly because of her race and/or gender, neither her subjective belief or that of others is enough to present this case to a jury. The Court finds that Mills has presented no genuine issue of material fact regarding whether she was subjected to harassment based on race or gender, and therefore she has failed to present a prima facie case for a hostile work environment under Title VII. Therefore, the Court GRANTS the City’s Motion for Summary Judgment on this remaining claim.”

On June 21, 2019, here other claims of race and gender discrimination were dismissed:

https://www.leagle.com/decision/infdco20190624a02
Legal Lessons Learned: EMS protocols must be followed, and suspension / remediation training is an appropriate corrective action. [Also filed, Chap. 8, Race Discrimination.]

13-32

OK: EMS HELD BACK FROM PD SHOOTING FOR 12 MINUTES – CONFIRM SCENE SECURE - QUALIFIED IMMUNITY

On Sept. 6, 2019, in Briena Crittenden, as personal representative of estate of Joshua P. Crittenden v. City of Tahlequah, Officer Randy Tanner, et al., the U.S. Court of Appeals for the 10th District (Denver) held (3 to 0) that U.S. District Court judge properly granted summary judgment to the police officers and the City. https://law.justia.com/cases/federal/appellate-courts/ca10/18-7036/18-7036-2019-09-06.html

Circuit Judge Michael R, Murphy wrote:

“There is no precedent supporting the notion that police officers have an affirmative duty to provide immediate medical care in situations such as the instant case. See Wilson v. Meeks, 52 F.3d1547, 1556 (10thCir.1995), abrogated on other grounds by Saucier v. Katz, 533 U.S.194 (2001). In Wilson, after a police officer shot a man holding a gun, other officers handcuffed the victim before medical help arrived. Id. The officers did not provide medical care or first aid before EMS arrived. Id. The victim’s estate alleged the officers interfered with EMS by refusing to remove the handcuffs upon request.Id. This court, applying the Fourteenth Amendment deliberate indifference standard, held that neither the handcuffing nor the refusal to remove the handcuffs amounted to a constitutional violation. Id. Further, Wilson refused to hold that the Due Process Clause establishes an affirmative duty on police officers to provide medical care (even something as basic as CPR), in any and all circumstances, or to render first aid.”

Legal Lessons Learned: Police enjoy qualified immunity, particularly where EMS is held back while scene is secured. EMS should document reasons for delay, and subsequent medical care provided.

13-31

GA: SOFT RESTRAINTS - MANIC EPISODE - POLICE VIDEOS SHOW NEED FOR RESTRAINTS - QUALIFIED IMMUNITY


The court held:
“Contrary to Ellison’s contentions, the use of soft restraints is a tool available to Paramedic Gasaway and EMT Howard in performing their job-related functions. See Davenport, 906 F.3d at 940. Thus, because Paramedic Gasaway’s and EMT Howard’s actions were not outside their ‘arsenal’ of powers, they acted within their discretionary authority.”

Legal Lessons Learned: Thanks to officer’s video cameras, both the U.S. District Court judge, and the Court of Appeals, had a “minute by minute” view of what occurred in getting this patient [who is a practicing attorney] out of her apartment and to the hospital.

13-30

IL: STROKE PATIENT WHO RAN OUT HOME – EMS TACKLED ON DRIVEWAY - LAWSUIT PROCEED, FACTS IN DISPUTE


Judge Shadid wrote:

“Between the bottom of the stairs and the front door, Plaintiff’s pants began to fall down and Defendant Sauder attempted to pull them up. (Docs. 37 at 8, 42 at 10). Plaintiff turned at least the top half of his body in a manner Defendants Riggenbach and Sauder state they found aggressive. (Docs. 37 at 8, 42 at 10). He then ran out the front door, down the front steps, and into the driveway, falling three times as he ran. *** What happened next is disputed in large part, but the parties agree that Defendant Sauder bear-hugged Plaintiff, both Defendant Sauder and Plaintiff ended up on the ground, and Defendants Duckworth, Riggenbach, and Sauder, along with Knaus, restrained Plaintiff on the ground.

***

However, Plaintiff is correct that the state-created danger theory is not duplicative of his other claims. See Monfils v. Taylor, 165 F.3d 511, 515–517 (7th Cir. 1998) (recognizing the existence of a substantive due process claim for a state-created danger).…Therefore, Plaintiff’s due process claim survives summary judgment on the state-created danger theory alone.”

Legal Lessons Learned: On an EMS run where there is a struggle with the patient, thoroughly documents on EMS run report the actions taken by each medic. This will help avoid “facts in dispute” in any subsequent civil lawsuit, and any prosecution for assault.
MI: GURNEY TIPPED – LAWSUIT TO PROCEED - EMS DIDN’T TELL HOSPITAL OR DOCUMENT – X-RAYS SHOWED NECK FRACTURES

On Aug. 27, 2019, in *Estate of Ralph Brown, by Victoria Brown, Personal Representative v. Sean Wolan and Jeffrey Vescio*, the Michigan Court of Appeals, held (2 to 1) in an unpublished opinion, that the trial court judge properly denied the two paramedics’ governmental immunity motion to dismiss.

The 2-judge majority held:

“The failure to report the incident has additional import on the issue of whether the conduct of the defendants was grossly negligent. They had an undisputed duty to make such a report. Indeed, Vescio acknowledged in his deposition that the incident should have been reported. Vescio testified that Wolan was responsible for documenting the ambulance run and communicating information to the ER staff. Wolan explained that he did not report or document the incident because he did not believe the decedent had been injured. To the contrary, Everlove [expert witness] testified that the reporting of the incident, regardless of the paramedics’ assessment of injury, was crucial to patient care at the hospital. Additionally, the veracity of Wolan’s testimony regarding his belief that there was no injury is belied by his partner Vescio’s description of the incident in his e-mail to his supervisors where he reported that, ‘the patient [was] hanging sideways reaching out while remaining belted onto the stretcher.’ A rational juror thus could believe that the EMTs did not assess the patient and failed to even report the indecent to those charged with the patient’s medical care or record the incident in the transport record that would have been used by the hospital staff to inform patient care decisions. On this record, a reasonable juror could determine that the EMTs showed ‘a substantial lack of concern for whether an injury results.’ Defendants’ failure in regards to reporting cannot be considered accidental.” [https://casetext.com/case/estate-of-brown-v-wolan-1](https://casetext.com/case/estate-of-brown-v-wolan-1)

Legal Lessons Learned:  When “things go bad” on a run, inform hospital and supervisors and document on EMS run report.

IN: UNRESP. DRIVER – DRIVES OFF WHEN MEDIC SEES REVOLVER – CONV. WITHOUT GUN FOUND – MEDIC’S FIREARM KNOWLEDGE
On July 15, 2019, in Evan Michael Sapp v. State of Indiana, the Court of Appeals (3 to 0) upheld the jury’s conviction, even though no firearm was ever recovered. He received 12-year sentence as a serious violent felon, based on prior burglary conviction.

“We likewise reject Sapp’s broader argument that no reasonable trier of fact could have found from the evidence presented that what Osborne saw was a firearm (i.e., not a toy).
Osborne, who had decades of experience with guns, testified in considerable detail about the gun that he saw, including its color, that it was a revolver, similar to one he owned, and had a ‘trap door’ feature consistent with small caliber pistols. Transcript Vol. II at 232, 235. He also said that, when he saw it, he did not think it was a toy and, in fact, was afraid for his safety when Sapp appeared to be reaching for it.”

Legal Lessons Learned: Paramedic’s long experience with firearms, and his written report to police shortly after the EMS run, were powerful evidence.

Note: Under prior Indiana case law, a firearm does not need to be recovered to convict for unlawful possession.

“Sapp acknowledges that our courts have sustained a conviction in circumstances when the firearm was not located after the defendant’s arrest but urges that, unlike where a defendant displayed or used a weapon, he did nothing “to signify or imply that the item [in his truck] was a ‘firearm.’” Id. at 5. We disagree… Footnote 1: See e.g., Gray v. State, 903 N.E.2d 940, 943 (Ind. 2009).

13-27

CA: FLIGHT PARAM. KILLED HELICOPTER CRASH – ONLY WORKERS COMP - CAN’T SUE HELICOPTER CO. - “SPECIAL EMPLOYEE”

On May 24, 2019, in Brooke Juarez v. Rogers Helicopters, Inc., et al., the Court of Appeals for California, Fifth Appellate District, held (3 to 0) in an unpublished decision, the trial court properly granted summary judgment to the helicopter company; the deceased paramedic was a “general employee” of American Airborne company, and a “special employee” of Rogers Helicopter, and therefore workers compensation was the sole remedy for the wife of the deceased paramedic.

“In sum, based on the facts and circumstances of this case, since SkyLife was Juarez’s special employer, SkyLife’s general partners, American Airborne and Rogers Helicopters, are also Juarez’s special employers. As such, respondents are all immune from tort liability and the trial court properly granted summary judgment in their favor.”
https://www.courts.ca.gov/opinions/nonpub/F076225.PDF

Legal Lessons Learned: Flight paramedics may be considered “dual employees” in many states; and workers comp. is their sole remedy for injury or death in those states.
See article on the crash:
See this article about air care helicopter crashes: https://www.plaintiffmagazine.com/recent-issues/item/ems-helicopter-crashes-raise-complex-liability-issues

“Of course, if the crash was caused by a defect in the helicopter, the crew case may proceed against the helicopter manufacturer. But there are legal challenges to be overcome there as well. A federal statute of repose known as the General Aviation Revitalization Act, or GARA, bars claims against the manufacturer if the helicopter is older than 18 years. And beneath their shiny paint, most of the helicopters now in service date back to the 1970s. (In case you’re wondering, GARA protects not just US helicopter manufacturers, but foreign helicopter manufacturers too.)”

13-26

KY: DRIVER / POSS. STROKE - REFUSED TREATMENT - PD TOOK HIM TO McDonalds – KILLED WALKING HWY – QUALIF. IMMUNITY

On May 24, 2019, in Lisa K. Williams v. City of Georgetown, KY, et al., the U.S. Court of Appeals for 6th Circuit, in an unpublished opinion, held (2 to 1).

“This case presents tragic facts without a legal remedy. *** Although it is true that ‘an officer’s duty exists even after the custodial relationship has ended,’ Davis, 143 F.3d at1025, it does not extend in perpetuity. Plaintiff admits that the officers concluded Burns was not a danger to himself or others. Calling an ambulance and giving Burns a ride to McDonald’s does not strike us as the deliberate indifference described in Davis. 143 F.3d at1027; see also Salyers, 534 F. App’x at 460. There was no constitutional violation.”
http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0272n-06.pdf

Legal Lessons Learned: Fire & EMS Departments should have a written policy about patient refusals that includes handling situations where the individual can not be safely left at the scene (such as MVA, with no ride home).

See attached Policy on “High Risk” and “Low Risk” refusals.

13-25

CA: CHILD CHOKING, MOTHER CALLED 911 - ONLY SPOKE SPANISH – IMMUNITY - NO REQ. THAT DISPATCHERS MUST SPEAK SPANISH
On May 20, 2019, in Dylan Tellez v. City of Pomona, the Court Of Appeal of California, Second Appellate District / Division One held (3 to 0) in an unpublished decision, that the lawsuit against the City of Pomona was properly dismissed by the trial court.

“That one person fails on an occasion to understand another is an everyday occurrence between even the best intentioned. And it appears from Dylan’s allegations that the police officers’ decision not to wait for an ambulance saved his life. A city cannot be held liable simply for failure to provide translators in its 911 call centers....”

https://www.courts.ca.gov/opinions/nonpub/B284099.PDF

Legal Lessons Learned: 911 Centers do not have to employee Spanish-speaking dispatchers. There are translation services available for dispatch centers.

See for example: “How to Break the 9-1-1 Language Barrier,”
https://www.emsworld.com/article/12091816/language-translation-in-emergencies “According to Gallegos, the LanguageLine system is built into the CAD system, so the ECO just has to push a button to be connected. The LanguageLine is used in call centers statewide and falls under the New Mexico Department of Finance and Administration.”

13-24

NY: EMT SUING RESTAURANT - SLIP & FALL ICY SIDEWALK, HELPING PATIENT WHO FELL – MUST PROVE RESTAURANT KNEW ABOUT ICE

On April 5, 2019, in Michael Benny v. Concord Partners 46Stree LLC, Supreme Court of New York, Part 63, 2019 NY Slip Op 30983(U), Judge Tanya R. Kennedy denied the EMT’s motion for summary judgment. “Here, the testimony raises factual issues as to the length of time the alleged condition existed and whether the defendants knew about the condition in enough time to remedy the situation. Plaintiff testified that he did not observe any ice prior to his accident, and it is unknown whether the condition was visible and apparent to the defendants.”

Legal Lessons Learned: Lawsuit will now be tried. The “danger invites rescue” doctrine is applicable only in extreme emergency, helping another avoid serious injury or death.
MI: PRIVATE AMBULANCES – COUNTY ORDINANCE THAT CO. MUST GET THEIR APPROVAL – FED. JUDGE WILL NOT DECLARE THIS LAWFUL

On March 25, 2019, in Saginaw County v. State Emergency Medical Service, Inc., U.S. District Court Judge Terrence B. Berg, again denied the County’s request for a declaratory judgment that its ordinance is lawful and not a restraint of trade under Sherman Antitrust Act. “Plaintiff sought a declaration that their ambulance plan was legal and not in violation of the Sherman Act, among other statutes. But they did not plead adequate facts to show that this is true. The Court made no finding whatever on the question of whether Saginaw County’s plan ran afoul of the Sherman Act, it simply concluded that, on the facts as alleged, the Court could not declare as a matter of law that the plan does not violate the Act.”

See also article on this decision in Antitrust News: https://lrus.wolterskluwer.com/store/daily-reporting-suite/antitrust-law-daily/

Legal Lessons Learned: Competition among private ambulance companies is generally good for patients.

HHS OPINION: CLINIC PROVIDE FREE HOME VISITS – CHF / COPD PATIENTS – NOT FED. ANTI-KICKBACK


“Requestor [clinic] has developed a program to provide free, in-home follow-up care to certain patients who it certifies are at higher risk of admission or readmission to a hospital. Under the Current Arrangement, Requestor offers in-home care to patients with congestive heart failure (‘CHF’) who qualify for participation, and under the Proposed Arrangement, Requestor would expand the program to qualifying patients with chronic obstructive pulmonary disease (‘COPD’). According to Requestor, the goals of both Arrangements are to increase patient compliance with discharge plans, improve patient health, and reduce hospital inpatient admissions and readmissions.

Legal Lessons Learned: Community Paramedicine programs are rapidly expanding throughout the Nation.

PA: ATTEMPTED MURDER CONV. UPHELD - EMT TESTIFIED ABOUT VICTIM’S COMMENTS ABOUT WHO SHOT HIM

On Feb. 22, 2019, in Commonwealth of Pennsylvania v. Gregory Mack, the Superior Court of PA held (3 to 0) that the jury conviction is affirmed. One of the issues on appeal was veracity of the EMT who testified at the criminal trial:

“Moreover, at trial, the emergency medical technician (EMT) who transported the victim to the hospital testified that the victim told him that his friend shot him; on appeal, Appellant claims the testimony was
invalid and lacked veracity because the EMT did not make a record of the conversation or subsequently inform the police of it.”  
http://www.pacourts.us/assets/opinions/Superior/out/memorandum%20%20affirmed%20%2010388943251531544.pdf#search=%22GREGORY%20MACK%20%27Superior%2bCourt%27%22

Legal Lessons Learned: EMS should document a victim’s statement concerning who shot him, either on the EMS run report or on a supplemental report. This helps avoid issues on appeal.

13-20

OH: DUI - BLOOD DRAW BY NURSE UNCONSCIOUS DRIVER LAWFUL - PD NO TIME FOR SEARCH WARRANT
On Feb. 12, 2019 in State of Ohio v. Richard Barnhart, Jr., Court of Appeals of Ohio, Fourth Appellate District – Meigs County, held (3 to 0) that trial court properly allowed into evidence the results of the blood draw. The Court write:

“[B]ased upon the totality of the circumstances, we conclude that the blood sample obtained from Appellant, which was taken while he was unconscious at the hospital and being prepared for transfer to another facility, was both lawful and constitutionally valid pursuant to Ohio’s Implied Consent statute, as well as both the consent and exigent circumstances exceptions to the warrant requirement.”


Legal Lessons Learned: Implied consent statutes are an important part of highway safety.

13-19

WA: PATIENT WITH CHEST PAIN REFUSED TRANSPORT - FORCIBLY TAKEN TO HOSPITAL – NO QUALIFIED IMMUNITY
On Jan. 11, 2019, in El-Fatih P. Nowell v. Trimmed Ambulance, LLLC, et al, U.S. District Court Judge Robert S. Lasnik (Seattle, WA), denied EMS defendants’ motion for summary judgments on most of the allegations of “involuntary detention and transport to a medical facility.”

https://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2017cv01133/248111/33

Legal Lessons Learned: When EMS are faced with the difficult decision on whether to forcibly transport a patient, consider first calling the hospital emergency department and getting medical clearance to transport.
OH: 911 DISPATCHES FOR DRUG OVERDOSES – NOT HIPPA PROTECTED UNLESS DISCLOSES PHI

On Dec. 14, 2018, in Rachel L. Dissell v. City of Cleveland, the Ohio Court of Claims appointed a Special Master to advise the Court on request for records by a reporter for the The Plain Dealer newspaper. The Special Master concluded that Computer Aided Dispatch records, including addresses where EMS responded, be released under Ohio Public Records Act. “Upon consideration of the pleadings and attachments, I recommend that the court order respondent to provide requester with a copy of the EMS/Fire CAD event summary records, as submitted under seal.”

Legal Lessons Learned: In producing CAD or other records on EMS calls, be very careful to exclude any “Protected Health Information.” If in doubt, advise requester that info is HIPAA protected and will only be revealed to Court under seal.

PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SU ET HOSPITAL [also filed, Chap. 6]

On Nov. 21, 2018, in Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al., the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. “We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees’ sensitive personal information stored by the employer on an internet-accessible computer system.”

Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.

Note: Ohio has enacted the Ohio Data Protection Act, effective Nov. 2, 2018 (to be in Ohio Revised Code 1354.01-05), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework. See Sept. 20, 2018 article, “New Ohio law incentivizes businesses that comply with cybersecurity programs,”

13-16
OH: PUBLIC RECORDS REQUEST – INCLUDING EMS INJURED ON JOB – CITY’S DELAY UNREASONABLE, PAY $8,812 ATTORNEY FEES
On Nov. 14, 2018, in Cleveland Association Of Rescue Employees – Local 1975 v. City of Cleveland, the Ohio Court of Appeals for Cuyahoga County, held (3 to 0) held that the City must reimburse CARE $8,812.50 in attorney fees.

“This court finds that the city’s failure to respond to the records request by releasing the requested records in this case was unreasonable. The city’s two-month delay in producing some of the records and more than five-month delay in producing all the requested records constitutes a failure to respond within a reasonable time.” https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-4602.pdf

Legal Lessons Learned: Public records act statutes require prompt response; political subdivision should promptly produce readily available records, such Fire & EMS job descriptions and certifications.

13-15

KY: STERNUM RUB ON PATIENT WHO HAD BECOME UNRESPONSIVE – CAN’T SUIT EMS FOR ASSAULT
On Oct. 9, 2018, in Troy K. Scheffler v. Alex Lee, et al., the U.S. Court of Appeals for 6th Circuit (Cincinnati, OH) held (3 to 0) that the U.S. District Court had properly granted summary judgment and dismissed the lawsuit against EMT Michael Carroll.

“Scheffler consented to medical care by asking to be taken to the hospital and by willingly entering the ambulance with the EMTs, and there is no indication that Scheffler withdrew or limited that consent. Carroll performed the sternum rub as part of that care.” http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0499n-06.pdf

Legal Lessons Learned: Thoroughly document reasons for a sternum rub, or other medical procedures.

13-14

NY: FF FELL WHEN AMBUL. BACK STEP NOT LOWERED – ACCIDENTAL DISAB. CLAIM UPHELD [also filed, Chap. 6]
On Sept. 6, 2018, In The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller, the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an “accident” on the “malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety.” http://decisions.courts.state.ny.us/ad3/Decisions/2018/526165.pdf
Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.

13-13

NJ: PARAMEDIC STUDENT WAS GIVEN 6-MONTH EXTENSION TO COMPLETE CLINICALS – NO FURTHER EXTENSIONS

On Sept. 4, 2018, in The Matter Of Denial Of Waiver For Alberto Sanchez, the Superior Court of New Jersey, Appellate Division, held (2 to 0 in unpublished opinion) that State EMS Board properly refused to grant an extension of total training time. “Despite obtaining an extension [of six months to complete clinicals], Sanchez failed to timely complete his clinical training by not participating in at least five cardiac arrest resuscitations and not successfully performing at least five defibrillations and synchronized cardioversions. N.J.A.C. 8:41A-2.6(a)(9) and (10). He only participated in three cardiac arrests, and failed to complete any defibrillations or cardioversions. *** The OEMS denied the waiver [of 36-month total training time] request on March 6, 2017, because under N.J.A.C. 8:41A -2.4, his training could not be extended beyond February 6, 2017– thirty-six months of his starting date – and there were public health concerns if he was allowed more time.”


Legal Lesson Learned: Courts are generally very reluctant to overturn decisions of State agencies, such as EMS Boards, regarding the protection of health of the public.

13-12

OK: VERY EXPENSIVE TRANSPORT BY HELICOPTER – PATIENTS CAN’T SUE, FED. STATUTE

On Aug. 31, 2018, in Susan Schenberger, Lacy Stidman and Johnny Trent v. Air Evac EMS, Inc.and Air Evac EMS, Inc., the U.S. Court of Appeals for the 10th Circuit, held (3 to 0) that the lawsuit was properly dismissed:

“Like the district court in this case, we have previously recognized that [Airline Deregulation Act] preemption may sometimes produce harsh results for potential plaintiffs seeking redress for perceived unfair treatment by air-ambulance carriers. See Cox, 868 F.3d at 906-07. Yet, we felt constrained to observe that ‘[s]uch policy considerations . . . are beyond the purview of [the courts]’ and ‘must be addressed to Congress.’ Id.; see also Ferrell v. Air EVAC EMS, Inc., ___ F.3d ___, No. 17-2554, 2018 WL 3886688, at *3 (8th Cir. Aug. 16, 2018) (‘We may not refuse to apply ADA preemption merely because we do not believe it
Legal Lessons Learned: Air ambulance rates, like many other medical charges, can indeed be very expensive, but the remedy is with Congress.

13-11

NY: ALLERGIC REACTION TO DOG BITE – PATIENT DIED – EMS PROTOCOL WAS NOT FOLLOWED, NO GOV’T IMMUNITY

On August 16, 2018, in Christine Lynch v. Town of Greenburg and Greenburg Police Department Emergency Medical Service, the NY Supreme Court, County of Westchester (Judge Lawrence E. Ecker), denied the defendants’ motion for summary judgment. “In fact, despite being told that the decedent was having an allergic reaction to the dog, Marcello acknowledged that he did not consider whether the attack was an allergic attack, verses another form of asthma incident. He also specifically stated that he never considered giving the decedent any medication to address an allergic reaction.” The Court also noted poor affidavit from EMS Supervisor:

“Despite acknowledging that ‘this action sounds in medical malpractice’ …, defendants do not submit a physician’s or EMT expert affirmation specifically addressing the precise medical treatment rendered to the decedent. Instead, defendants rely upon the affidavit of an EMT Supervisor who offers generalized, conclusory statements to the effect that EMS protocols permit EMTs to exercise discretion, without ever addressing any of the specifics of defendants’ actions in this case. In fact, the specific protocols are not discussed or explained, the actual medical actions taken by the first responders are not delineated or compared to protocols, specific examples of acts of discretion by the first responders are not provided, and there is no express support for the medical care that was given.”


Legal Lessons Learned: Follow EMS protocol, or explain on EMS run report why the protocol was not followed.

13-10

IN: SEDATIVE FOR NAKED PATIENT RUNNING IN STREET – DIED - QUALIFIED IMMUNITY FOR EMS

On Aug. 14, 2018, in Billie Thompson v. Lance Cope, 7th Circuit, the Court held (3 to 0),
“The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee’s Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency.” Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative; patient died 8-days later. https://cases.justia.com/federal/appellate-courts/ca7/17-3060/17-3060-2018-08-14.pdf?ts=1534262420

Legal Lessons Learned: Qualified Immunity protects police, fire, EMS personnel from personal liability.

See also U.S. Supreme Court’s Jan. 7, 2019 decision, in City of Escondido, California v. Mart Emmons, (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: “As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” https://www.supremecourt.gov/opinions/18pdf/17-1660_5ifl.pdf

OH: DYING DECLARATION BY VICTIM IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 1]

On July 25, 2018, in State v. Fred Taylor, 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

“Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.” https://cases.justia.com/ohio/ninth-district-court-of-appeals/2018-28746.pdf?ts=1532525904

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a “dying declaration” is admissible in evidence. Recording the comments on your run report can help prosecution reach a plea agreement.

LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT [also filed, Chap. 6]

On July 18, 2018, in Patrick Alan Benfield & Brian Warren v. Joe Magee, et al., U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may
proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled:

“The motion [to dismiss] is DENIED as to Warren’s free speech claim because the facts alleged establish that his letter was protected speech.”

https://cases.justia.com/federal/district-courts/louisiana/lawdce/5:2018cv00034/160852/18/0.pdf?ts=1532079100

Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

KY: EMT WHISTLEBLOWER – ALLEGED TRANSPORTS NOT MEDICALLY NECESSARY – BUT FAILED TO PROVIDE SPECIFICS


“Stipe was employed in a care provider role as an EMT and she does not allege that her job involved any work related to billing or that it gave her detailed or specialized knowledge of PCFC’s billing practices…. Accordingly, Stipe lacks the specialized knowledge necessary to invoke the exception to Rule 9(b).”

https://cases.justia.com/federal/district-courts/kentucky/kyedce/5:2016cv00446/81785/59/0.pdf?ts=1529661227

Legal Lessons Learned: Whistleblowers alleging fraudulent “up charging” must include in their complaint specific information about particular EMS runs where Medicare was overbilled. With specifics, the U.S. Attorney can launch an investigation of the complaint that has been filed under seal.

See U.S. Department of Justice report: “Of the $3.7 billion in settlements and judgments reported by the government in fiscal year 2017, $3.4 billion related to lawsuits filed under the qui tam provisions of the False Claims Act. During the same period, the government paid out $392 million to the individuals who exposed fraud and false claims by filing a qui tam complaint.”

VA: AMMONIA CAPSULES FOUND IN NOSE OF DECEASED JAIL INMATE - LAWSUIT AGAINST NURSE, OTHERS MAY PROCEED

On May 31, 2018, in Benjamin M. Andrews, Administrator of Estate of Zachary Tuggle v. Sheriff C.T. Woody, et al., a U.S. District Court Judge for Eastern District of Virginia (Richmond Division), issued two memorandum, holding (1) jail nurse and other jail personnel will not be granted summary judgment; and (2) that defense expert report of Dr. William J. Brady will not be admitted.


Legal Lessons Learned: EMS in this case properly documented to unusual conditions they observed.

The U.S. Supreme Court has instructed judges to carefully screen reports of proposed “experts.” Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Federal Rules of Evidence were adopted to further clarify review of proposed expert written reports: https://www.law.cornell.edu/rules/frcp/rule_26

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

OH: 911 “GOOD SAMARITAN” LAW – DRUG OVERDOSE, CAN AVOID PROSECUTION IF CALL 911, GET TREATMENT [also filed, Chap. 18]

On May 18, 2018, in State of Ohio v. Andrew Melms, the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: “Granted Melms seemingly was an ideal candidate
for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals.”


Legal Lessons Learned: The “911 Good Samaritan” immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).

Note: 911 Dispatchers are required to inform overdose patients about the new law:

R.C. 128.04 provides as follows:
(A) Public safety answering point personnel who are certified as emergency service telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.
(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller’s inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

13-4

MI: DYING DECLARATION BY VICTIM TO PARAMEDIC – ADMISSIBLE IN MURDER TRIAL

On April 19, 2018, in State of Michigan v. Christopher Tank, the State of Michigan Court of Appeals, upheld the jury conviction (3 to 0), holding “there was no plain error in admitting the victim’s dying declaration identifying defendant as his assailant.”


Legal Lessons Learned: Dying declarations are admissible; include victim’s exact words in “quotes” in the EMS run report.

13-3

MI: CPR – NO NEED TO PERFORM WHEN PATIENT CLEARLY DEAD - LIVIDITY, NO PULSE

On April 12, 2018, in Eusebio Saldana v. Nathan Smith and Sanilac County Sheriff’s Office, the State of Michigan Court of Appeals held (3 to 0; unpublished decision) that the police officer “exercised his discretion based on his
experience and training in identifying Michael's condition and acting according to those conclusions.”

Legal Lessons Learned: Michigan statues protect police & EMS from liability, unless proof of gross negligence.

13-2

**OH: DRUNK DRIVER - URINE / BLOOD TESTS IN EMERGENCY ROOM BY ORDERS OF PHYSICIAN - NO 4TH AMENDMENT VIOL. BY PD**

On March 26, 2018, in *John W. Gold v. City of Sandusky, et al.* U.S. Magistrate Judge for the U.S. District Court, Northern, OH, issued a Memorandum Opinion and Order dismissing the civil rights lawsuit filed against the City, police officers, and ER medical staff, holding: “To the extent Plaintiff argues the officers violated his Fourth Amendment rights in the insertion of the catheter or in taking his blood, such a claim fails for the reasons stated above. That is, there is no evidence the catheter was placed, or blood drawn, at the request of the police. Rather, it was medical personnel who made the decision and performed the action.”

http://courtweb.pamd.uscourts.gov/courtwebsearch/ndoh/AIKFfOZU_k.pdf

LEGAL LESSONS LEARNED: Blood and urine may be obtained in ER for medical reasons, without patient consent; police may obtain a search warrant for use in criminal case.

13-1

**OH: AMBULANCE IN MVA – EMT DRIVER SPEEDING, PASSING IN NO PASSING ZONE, NO LIGHTS & SIREN** [also filed, Chap. 5]

On Jan. 2, 2018, in *Folmer v. Meigs County Commissioners, et al.* 2018-Ohio- 31, 4th Appellate District (Meigs County), the Court held that the EMS driver may have been negligent when transporting a patient traveling over 20 mph above posted speed limit, with no lights or siren, and attempted to pass vehicle in no passing lane, hitting oncoming vehicle. While the lawsuit may proceed against Meigs County EMS, the EMS driver enjoys immunity from personal liability since plaintiff did not alleged he “acted with malicious purpose, bad faith, or recklessness under R.C. 2744.03(A)(6)(b).”


Legal Lessons Learned: If transporting without lights and siren, then EMS driver must obey speed limit and no passing zone. The EMS driver was fortunate the plaintiff did not allege he was driving in “wanton or reckless manner.”
**TX: RECRUIT BROKE ANKLE TRAINING RUN, RESIGNED - CLAIMS HARASSED BY LIEUTENANT – AN “ISOLATED INCIDENT” - DISMISSED**

On Oct. 14, 2020, in Bryce Baker v. City of Arlington, U.S. District Court Judge Mark T. Pittman, Northern District of Texas, granted the City’s motion to dismiss. The recruit broke his ankle during a training run and resigned; he claims that prior to injury, Training Lieutenant harassed him in front of recruit class about having joined in a class action lawsuit against City, and following the injury urging him to resign. Case dismissed; isolated acts by training officer does not prove City endorses such conduct.

“Baker asserts a single claim against Arlington for First Amendment retaliation under 42 U.S.C. § 1983. Compl. at ¶ 20-24. However, as explained below, Arlington cannot be held liable under Monell because Baker actually pleaded a policy against the harassment Baker alleges. Id. at ¶ 18. Further, Baker's bare allegation that Lt. Price is a policymaker is conclusory and, as such, is insufficient to state a claim.

***

Further, Arlington cannot be held liable under § 1983 for an isolated incident involving one of its employees. Under § 1983, "isolated unconstitutional actions by municipal employees will almost never trigger liability." Piotrowski, 237 F.3d at 578. Arlington makes this argument in its Motion to Dismiss when it states that Baker's claims are directed at a single former Arlington employee—a fire department trainer.’ MTD at ¶ 2.01. Baker fails to plead any facts that the alleged harassment and badgering were anything more than an isolated situation between one trainer and one employee. These isolated acts of one employee do not constitute ‘widespread practice’ and thus cannot be said to qualify as a custom under Monell. See Peterson, 588 F.3d at 847. Therefore, the Court finds that Baker did not plead sufficient facts to identify any official Arlington policies or customs actionable under § 1983. Arlington's Motion to Dismiss should be and hereby is GRANTED.”

Legal Lesson Learned: Isolated acts by training lieutenant, while unfortunate, do not establish a basis for liability of the City.

**AL: PREGNANT EMT – DENIED LIGHT DUTY – AMR CO. PROVIDES ONLY INJURED ON JOB - LAWSUIT REINSTATED**
On April 17, 2020, in Kimberlie Michelle Durham v. Rural/Metro Corporation, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the U.S. District Court judge had improperly granted summary judgment to AMR.

“We therefore vacate the grant of summary judgment. Neither a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Since neither can meet the lifting requirement, they are the same in their ‘inability to work’ as an EMT. And that satisfies the plaintiff’s prima facie requirement to establish that she was ‘similar [to other employees] in their ability or inability to work.’”


Legal Lessons Learned: Congress in enacting the Pregnancy Discrimination Act did not specifically address the issue of light-duty; hopefully the U.S. Supreme Court will ultimately give clear direction on this issue.

14-2

NY: FDNY RECRUIT DIED DURING PHYSICAL EXERCISES – HEART CONDITION [also filed, Chap. 2]
On April 10, 2018, in Sherita Sears v. The City of New York, the Appellate Division of the Supreme Court of State of New York (5 to 0) denied the death claim, holding:

“Plaintiff is not entitled to recover under GML § 205–a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27–a was designed to protect, but rather, arose from risks unique to firefighting work (Williams v. City of New York, 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004] ).” https://caselaw.findlaw.com/ny-supreme-court-appellate-division/1893546.html

Legal Lessons Learned: The New York statute requires proof of “neglect, omission, willful or culpable negligence.”
New York Consolidated Laws, General Municipal Law - GMU § 205-a. Additional right of action to certain injured or representatives of certain deceased firefighters “In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars,
such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.”

14-1

**OH: DAYTON FD RECRUIT – REMOVED FROM CLASS AFTER KNEE INJURY – NO FMLA VIOLATION** [also filed, Chap. 10]
On Feb. 9, 2018 in Shawn N. Geisel v. City of Dayton, et al., Ohio Court of Appeals for Second Circuit (Montgomery County) held (3 to 0) that the FD had the authority to remove him from the recruit class and ‘demote’ him back to EMT.

“We do not mean to imply that Geisel could not reapply for the position, but only that his appointment to Firefighter Recruit was a self-contained opportunity that did not entail a right to be reappointed or to continue as a recruit until he could complete the training program.”


Legal Lessons Learned: Dayton Civil Services rules treat a FF recruit as a probationary employee; when injured in recruit school, can be “demoted” back to EMT-B and placed on light duty.
TX: PARAMEDIC WITH PTSD – DENIED “ON-DUTY” DISABILITY PENSION – 75% OF SALARY - CONFLICING PSYCHOLOGISTS

On Nov. 17, 2020, in Gregory Green v. Houston Firefighters’ Relief And Retirement Fund, the State of Texas in the Fourteenth Court of Appeals, held (3 to 0) that trial court correctly upheld the Board to deny on-duty disability pension for paramedic with 17-years of experience, given conflicting opinions of two mental health professionals. Plaintiff may be eligible for a non-duty disability pension; on-duty disability pensions are 75% of average salary if not capable of any gainful future employment; or 50% if can’t perform firefighter duties.

“The evidence before the Board and subsequently before the trial court was in direct conflict. [Dr. Ashley] Woolbert opined that Green experienced disability to the degree that he could not perform any full-time work. [Dr. Edwin] Johnstone, on the other hand, opined that Green’s only limitation in performing full-time work was the physical limitation of his shoulder. In a substantial evidence review the agency’s action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached to justify its actions. Texas Health Facilities Com’n, 665 S.W.2d at 453. Because the evidence was conflicting, the Board could have determined after reviewing Johnstone’s reports that Green did not qualify under the Act for on-duty disability. See id. (If there is evidence to support either affirmative or negative findings on a specific matter, the decision of the agency must be upheld).”

Legal Lesson Learned: Given the conflicting experts’ reports, Courts will uphold decisions of Boards.

SC: PARAMEDIC ON BAD MVA RUN – PTSD / PANIC ATTACKS – TOLD HOSP. CAN NO LONGER DO JOB, TERMINATED

On June 25, 2020, in Stephen E. Sanders v. McLeod Health Claredon, U.S. District Court Judge David C. Norton, U.S. District Court of South Carolina, Charleston Division, granted the hospital’s motion for summary judgment; on August 10, 2017, he responded MVA involving logging truck and an SUV, where SUV driver was trapped by logs and died. Court wrote: “[T]here is evidence in the record that Sanders could not perform the essential functions of his job at the time of his August 18, 2017 discharge. Sanders testified in his deposition that shortly after the August 10th accident, he began experiencing ‘severe . . . emotional problems’, including "anxiety, depression [and] panic attacks …. As a result, Sanders noted that he ‘couldn't stay around’ his place of work… As the first element of a prima facie case of disability discrimination, Sanders must show that he was a qualified individual with a disability at the time of his firing. There is no dispute that Sanders suffered from PTSD, a disability under the ADA, at the time of his discharge. The court's inquiry thus focuses on whether Sanders was a "qualified individual." Under the
ADA, “the term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The court agrees with the R&R that summary judgment is warranted on this basis because there is no evidence in the record that Sanders could perform the essential functions of his job at the time of his firing.  

Legal Lessons Learned: If the paramedic had asked the hospital for a leave of absence or other reasonable accommodation, and the hospital refused, this lawsuit might not have been dismissed.

15-8

NJ: FF FAILED PSYCHOLOGICAL EXAM FOR CAREER POSITION – FORMER MARINE – MEDICAL DISCHARGE WITH PTSD – APPEAL DENIED

On June 12, 2020, in Frank Rivera v. Township of Cranford, the Superior Court of New Jersey, Appellate Division, held (unpublished opinion) that the jury’s decision in favor of the Township is affirmed. The Court wrote: “ Plaintiff’s superiors denied ever hearing about any issues stemming from plaintiff’s military service or any medical diagnoses or treatment. There is no evidence to support the conclusion that the persons responsible for deciding whether to appoint plaintiff as a career firefighter–Dolan and the Township Committee–had either engaged in making or had heard the negative comments.”  

Legal Lessons Learned: PTSD is a difficult burden. Question: Would you allow the firefighter in this case to later take another psychological exam?

Note: See this article: Tips on how to pass your Firefighter Psychological Test (June 24, 2019): First, consider answering the questions briefly and honestly with the best of your ability. Secondly, before you answer any questions from the interviewer, take time to think and come up with the correct answer. Thirdly, don’t rush with your answers, be calm consider the questions for some time, take a deep breath and offer your solutions. http://www.firefighters-exam.com/2019/06/24/tips-on-how-to-pass-your-firefighter-psychological-test/

15-7

NY: FORMER FDNY EMT WITH PTSD – U.S. SOCIAL SECURITY DENIED BECAUSE SHE CAN PERFORM OTHER JOBS – COURT ORDERS SOCIAL SECURITY TO MAKE FUTHER REVIEW


https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZkQk422sTW9%2BWIIpk%2BnE1B7e7DrNn16tDd9SfmLDmtL4

Legal Lessons Learned: Mental health for emergency responders is thankfully now an item of great attention in the Fire, EMS and Law Enforcement, including Peer Support Teams.

15-6 [Also filed, Chap. 9 & Chap. 10]

PA: FF PANIC ATTACK ON DUTY – PTSD, MEDICATION – NO LONGER QUALIFIED AS FF – TERMINATION NOT VIOL. ADA

On April 17, 2020, in Robert Carpenter v. York Area United Fire And Rescue, U.S. District Court Judge Christopher C. Conner, Chief Judge, Middle District of Pennsylvania, granted the FD’s motion for summary judgment. The Court held that the firefighter was not a “qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation,” and indefinite leave of absence was not a reasonable accommodation; “there must be some expectation that the employee could perform his essential job functions in the ‘near future’ following the requested leave.

“[Fire Department] argues that Carpenter is not a qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation. We agree.”

Legal Lessons Learned: FF on leave and undergoing treatment, who desires to get back to the job, needs to stay in communication with FD. FMLA also addressed (see below).

Note: Court also held that the FF was not entitle the FMLA leave. “In a letter dated October 11, 2017, YAUFR denied Carpenter's FMLA leave request…. YAUFR explained that, although it was a covered employer under the FMLA, it did not employ the requisite number of people for Carpenter to be considered an ‘eligible employee’ under FMLA regulations. *** To qualify as an ‘eligible employee,’ the employee must be ‘employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.’ 29 C.F.R. § 825.110(a)(3); see 29 U.S.C. § 2611(2)(B)(ii). YAUFR avers, and Carpenter concedes, that YAUFR has never employed 50 or more people.”

15-5

MA: ANGER MGT, THREATS TO “GO POSTAL” – PAID LEAVE 1-YR - DIDN'T COMPLY RETURN-TO-WORK REQUIREMENTS - FIRED

On April 2, 2020, in Gerald Alston v. Town of Brookline, Massachusetts, Senior U.S. District Court Judge George A. O’Toole, Jr., District of Massachusetts, granted summary judgment for the Town, finding that he failed to meet the Fire Chiefs return to work requirements, including completing an anger management course, and passing a fitness for duty evaluation, and drug test.
“Alston was evaluated both by a psychiatrist chosen by the Town and, after his request for evaluation by a different doctor, an evaluation by a psychiatrist from the Massachusetts General Hospital was arranged. Both psychiatrists recommended essentially the same return-to-work conditions for Alston, and it is undisputed that Alston never complied with those conditions. Nor did he provide any conflicting opinion from another psychiatrist.”


Legal Lessons Learned: The Town wisely proposed a return-to-work plan and provided adequate time for completion of the plan.

15-4

NY: PTSD - CAR FIRE / MASK DISLODGED BY SNOW - PSYCHIATRIST’S NOTES FF INTERVIEW - ACCIDENTAL DISAB. RETIREMENT DENIED

On April 25, 2019, In The Matter of Alexander Hanon v. Thomas P. PiNapoli, State Comptroller, the New York Appellate Division, Third Department, (5 to 0), upheld the denial of his claim.

“Leslie Citrome, the psychiatrist who conducted an independent medical examination of petitioner on behalf of the Retirement System, opined that petitioner's PTSD and depressive disorder were causally related to [his off duty] June 2010 motor vehicle accident. He stated that the February 2010 accident [car fire run, snow from garage roof] was incidental to his psychiatric assessment as petitioner only mentioned this incident briefly, indicating that he suffered cardiac problems from inhaling smoke, and focused primarily on the June 2010 motor vehicle accident in discussing his history of psychiatric problems and symptoms.


Legal Lessons Learned: Courts rely on the expert testimony of independent medical examiners. Psychiatrist’s notes from interview with firefighter become part of the “psychiatric history” of patient.

15-3

IL: PTSD – COURT ORDERS DISABILITY PENSION - CHICAGO PARAMEDIC’S TRAUMATIC WORK EXPERIENCES

On Feb. 1, 2019, in Leah Siwinski v. The Retirement Board of the Fireman’s Annuity and Benefit Fund of the City of Chicago, the Appellate Court of Illinois (First District) held (3 to 0),

“In summary, because the manifest weight of the evidence showed that the plaintiff sustained PTSD arising from an act or acts of duty while working for CFD, and as a result, was disabled from performing any of her assigned duties, we reverse the decision of the Board that denied her a duty disability pension, and reverse the decision of the circuit court, which confirmed the Board’s decision."

Legal Lesson Learned: PTSD is a recognized disability issue in the emergency services.


15-2

MN: PTSD – NEW STATUTORY PRESUMPTION THAT PTSD IS WORKPLACE
Effective Jan. 1, 2019, the new state statute,


- In 2017, Colorado passed a bill recognizing PTSD as compensable under workers compensation. Then the state passed a bill allowing the treatment of PTSD using medical marijuana.
- South Carolina created a $500,000 fund to help fund first responders out of pocket medical costs related to the treatment of PTSD.
- Texas passed an act that eases the burden for first responders filing PTSD claims, requiring the lower standard of proof: “preponderance of evidence” and without the need to declare medical impairment.
- New York included PTSD references in the 2018 budget that would allow first responders to claim personal injury based on “extraordinary work-related stress” [Hanson & Watson, “Addressing the Emergence of PTSD Presumption: Issues and Solutions” pdf].


15-1
NJ: PTSD – POLICE OFFICERS MUST PROVE EXPERIENCED “TERRIFYING” & “UNEXPECTED” EVENT
On June 5, 2018, in Christopher Mount v. Board of Trustees, Police and Fireman’s Retirement System, the New Jersey Supreme Court (7 to 0) held in two cases (1) that police officer who observed three teenagers burned to death in MVA may have a claim; but (2) police hostage negotiator has no claim when SWAT Team killed the assailant.

“Although the shooting was clearly devastating to Martinez -- an officer exemplary for his professionalism and compassion in highly stressful circumstances -- it was not “unexpected…..”

Legal Lessons Learned: PTSD accidental disbenefit ability claims, with no physical injury, are particularly difficult to prove.
Chap. 16  Discipline

16-47

OK: FIRE CHIEF FIRED – WRITTEN WARNING, 1-YR LATER NEVER WORKED FF SHIFT, OTHER ISSUES - FIRED FOR “GOOD CAUSE”

On Nov. 4 2020, in Stephen Parmenter v. City of Nowata, Oklahoma, U.S. District Court Judge Terence C. Kern, U.S. District Court for the Northern District of Oklahoma, granted the City’s motion for summary judgment. The Fire Chief worked for a Chartered City which empowered the City Manager to terminate heads of department and others “at will.” In Aug. 2017, the City Manager issued written reprimand documenting numerous personnel issues; the Manager also added a requirement the Chief work one shift per week, which he never did for following year.

“Moreover, even assuming 11 O.S. §19-104 applies to Parmenter's claim, the undisputed record establishes that he was fired for ‘good and sufficient cause.’ On August 31, 2017, he received a formal, documented reprimand listing numerous issues and also ordering him to work at least one regular shift per week as a firefighter. Accordingly, he was aware that any further infractions could lead to disciplinary action—including termination—against him. For well over a year after the written reprimand, Carrick continued to address items listed in the written reprimand. During that time, and in contravention of the reprimand, he failed to work a single fire shift. Moreover, after meeting with fire department employees, Carrick learned of other issues—including that department morale was abysmal due to favoritism of one employee over the others, and that employees were trading shifts without documenting the trades, and then directly compensating each other for covered shifts.

The undisputed record supports the City's position that Parmenter's termination was for ‘good and sufficient cause.’” https://casetext.com/case/parmenter-v-city-of-nowata

Legal Lesson Learned: The City Manager thoroughly documented the employment concerns; she also provided “due process” to the “at will” Fire Chief.

16-46

NJ: RECUIT FIRED AFTER GRADUATING - CHIEF KNEW HE HAD ALTERED INSURANCE CARD NEW RESIDENCE - REINSTATED

On Oct. 19, 2020, In The Matter Of Christopher D’Amico, City of Plainfield Fire Department, the Superior Court of New Jersey (Appellate Division) held (3 to 0) that the Civil Service Commission properly reinstated the firefighter. The Fire Chief knew of the altered card and has allowed the firefighter to enter recruit school.
After reviewing the City’s exceptions, the Commission agreed with the ALJ. It held D’Amico provided his true address on the card and the addition of correct information on the document did not indicate a lack of character or morals to be a firefighter. Even if it were, the Commission concluded the City was aware of the altered document in May 2017, before D’Amico was hired and attended the fire academy. In addition, because D’Amico was on the job for only three or four hours at the time he was terminated, the Commission concluded the City had the burden of proving D’Amico was guilty of the charges. Based on its findings, the Commission reinstated D’Amico, and awarded him back pay, benefits, and seniority status.”


Legal Lesson Learned: Recruit was fortunate to have a Fire Chief who supported him. If city needed more proof of your residency, ask for additional time to prove you moved into the city.


16-45

LA: ASSISTANT CHIEF - LYING TO CHIEF ABOUT LUNCH PRESENTATION – PURGED CELL PHONE TEXTS – TERMINATION UPHELD

On Oct. 20, 2020, in Frederick N. Meiners, III v. St. Tammany Parish Fire Protection District No. 4, et al., the Supreme Court of Louisiana, held (6 to 1) that the District Court judge had no authority to overturn the Civil Service Board’s decision upholding the termination.

“We acknowledge the district court did not specifically impose a new sanction; rather, the district court's judgment simply states ‘remanded to the St. Tammany Parish Fire Protection District No. 4 Civil Service Board for further proceedings in accordance with this Judgment and the written reasons issued by the Court on November 14, 2018.’ Nonetheless, the clear implication of the court's judgment is that termination is excessive, and the Board must therefore revise its decision to impose a lesser sanction. Thus, although the district court did not explicitly dictate the sanction, it defined the parameters of the sanction as being something other than termination. This action clearly goes beyond the authority granted to the district court under La. R.S. 33:2561(E).”


Legal Lesson Learned: When under investigation for lying to a superior officer, conduct involving destruction of evidence (deleting texts from cell phone) can have very serious consequences.

16-44

CA: CAPTAIN’S EXAM - INTERVIEW QUESTIONS LEAKED TO 3 - DEMOTED, REAPPOINTED, THEN DEMOTED AGAIN – OVERTURNED
On Sept. 23, 2020, in Justin Chaplain, et al. v. State Personnel Board and Department of Forestry And Fire Protection, the Court of Appeals of the State of California, First Appellate District (Division One), held (3 to 0) that the State Personnel Board is reversed; CAL FIRE could not reimpose demotion of two Captains, since those firefighters had never appealed from their original demotion. Third Captain did appeal so Board does have jurisdiction over his case [hopefully CAL FIRE will likewise re-promote him].

“Here, the firefighters [Justine Chaplain and Justin Michels] have consistently claimed that the Board lacked the legal authority to proceed against them twice for the same behavior. Their specific argument that a substitution of disciplinary charges must occur before an action is concluded is based on principles related to statutory finality, not on those related to limitation periods.

On the merits, we agree with the firefighters that once a disciplinary action becomes final, the employer is prohibited from withdrawing it and initiating a new adverse action. The plain language of section 19575 could not be clearer: an appointing power's discipline is final where no appeal is taken within 30 calendar days.

***

Our analysis is different, however, for Schonig, who appealed the first notice of adverse action to the Board. His discipline thus was not final under section 19575 when CAL FIRE served him with the new notice of adverse action.” https://www.courts.ca.gov/opinions/documents/A155107.PDF

Legal Lessons Learned: The FD did not adequately prove that there was new evidence or other good cause to re-impose discipline a second time.

Note:

See June 14, 2015 article: “New Cal Fire demotions challenged, reveal more alleged cheating details.”
“Michels, Schonig and Chaplin allegedly received text messages last year from then-Cal Fire Academy instructor Orville Fleming that contained interview questions and answers for temporary fire captain jobs at the Ione training facility. Fleming was on the interview panel that ranked candidates, according the new batch of state records obtained via Public Records Act request.” https://www.sacbee.com/news/politics-government/the-state-worker/article23903194.html


16-43

**TX: DISTRICT CHIEF POSTED COMMENTS ABOUT TRANSFER OPENING - FF SOCIAL MEDIA GROUP – DISCIPLINE UPHELD, FD POLICY BREACH**

On Sept. 16, 2020, in Steven M. Dunbar v. Samuel Pena, Houston Fire Chief and Robert I. Garcia, Houston Assistant Fire Chief, the U.S. Court of Appeals for Fifth Circuit (New Orleans) held (3 to 0) that the Houston Fire Department lawfully suspended District Chief Dunbar (3 days, later reduced to one day) and transferred him to an administrative position in another FD district. The posting concerned a transfer opportunity, which is not a matter of public concern and therefore not protected under First Amendment. The District Chief posted on a private social
media group for HFD firefighters: "If you are thinking about putting in for a spot in District 64 on C-shift you better have your sh** together. Wanna play games like previously-assigned members? You will be miserable...promise."

“Public employees are entitled to circumscribed constitutional protections in connection with their governmental duties, but they ‘do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.’ Garcetti v. Ceballos, 547 U.S. 410, 417 (2006). Therefore, to be protected against adverse employment action in retaliation for speech, a public employee must speak in the employee's ‘capacity as a citizen,’ rather than pursuant to the employee's ‘official duties,’ and the employee must address a matter of public concern. Id. at 417, 421. Otherwise, ‘the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.' Id. at 418.

By contrast, employee-to-employee communications concerning particular transfer decisions generally do not implicate matters of public concern…. http://www.ca5.uscourts.gov/opinions/unpub/20/20-20087.0.pdf

Legal Lessons Learned: Social media posts about internal FD matters are not protected under First Amendment.

Note: Under HFD's transfer guidelines, ‘No member will communicate with [a] member requesting [a] transfer, including the incoming officer, to promote or influence the candidacy of a member or to discourage a member from applying for a posted or anticipated vacancy. Any violation of this directive will result in disciplinary action.’ A similar statement was included in the memorandum announcing the transfer opportunity.

16-42

WA: FIRE CHIEF TERMINATED – CONTRACT Requires “CAUSE” – LAWSUIT MAY PROCEED TO TRIAL

On Aug. 19, 2020, in David W. Bathke v. City of Ocean Shores & Crystal Dingler, U.S. District Court Judge Benjamin H. Settle, U.S. District Court, Western District of Washington at Tacoma, held that the City’s motion for summary judgment was denied concerning the “breach of contract” claim. As to Bathke's other claims, the Court grants Defendants' motion for summary judgment and dismisses Bathke's claims for retaliation, promissory fraud, and negligent misrepresentation.


“In this case, Bathke's declaration and supporting evidence sufficiently creates a question of fact on the issue of whether the City had just cause to terminate him. In reply, Defendants attempt to undermine the holding in Lund by misquoting employment discrimination cases…. Defendants, however, fail to provide any persuasive authority or reason to take this question of fact away from the factfinder. Therefore, the Court denies Defendants' motion on Bathke's breach of contract claim.”

https://public.fastcase.com/WI%2B2t%2BeVulI35%2FN70vAMFZiys29g9i6WW2vOdml284dJUoMj0gy8QWoByD0pzloLe
Legal Lessons Learned: Fire Chiefs, when accepting a new position, should include in their agreement that they cannot be fired except for “cause.”

16-41

OH: EMS CAPTAIN FIRED – FACEBOOK POST ABOUT DEATH TAMIR RICE – LAWSUIT REINSTATED, “PUBLIC CONCERN”

On Aug. 19, 2020, in Jamie Marquardt v. Nicole Carlton & City of Cleveland, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that the U.S. District Court judge in Cleveland improperly granted the city’s motion for summary judgment.

“Because Marquardt's social media posts addressed a matter of public concern, the district court erred in granting summary judgment on that basis.” [https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0268p-06.pdf](https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0268p-06.pdf)

Legal Lessons Learned: Social Media posts are resulting in terminations in the fire service; employers must carefully review whether the matter is of “public concern” before imposing discipline.

16-40

NY: CAREER FF / UNION SECRETARY FIRED FOR PUNCHING VOL. FF IN FACE – COMBINATION FD - LAWSUIT DISMISSED

On July 10, 2020, in Brian McNamara v. The City of Long Beach, et al., U.S. District Court Senior Judge Denis R. Hurley, Eastern District of New York (Central Islip, NY) granted summary judgment to the City. The Judge found that the formal misconduct charges were proved in a three-day hearing before the City Manager, and plaintiff failed to show that his activities as Union secretary, including articles he published, or that he was generally disliked by volunteer firefighters, was reason he was terminated. The Court wrote: Plaintiff picked up an audio recorder and went to the firehouse, where further altercations ensued, including the previously mentioned incident with Jacobi. Such behavior is unbecoming in any profession, and it is not surprising that Defendants would react adversely to it. Thus, for the foregoing reasons, Plaintiff has failed to show a material issue of fact as to a causal relationship between his allegedly protected speech or union membership and his termination.” [https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFzQ7Gx1Z4VLPzvmh59TfRHYGD4c0wvhFgn%2Bs0ncYh62](https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFzQ7Gx1Z4VLPzvmh59TfRHYGD4c0wvhFgn%2Bs0ncYh62)

Legal Lessons Learned: Violent assault on a fellow firefighter, whether volunteer or career, is completely unacceptable.
KY: FF MET 17-YEAR-OLD AT FIRE STATION – CONVICTED HAVING SEX WITH MINOR - TOOK VIDEOS AND PHOTOS

On July 7, 2020, in United States of America v. William Michael Fields, U.S. District Court Chief Judge Danny C. Reeves, Eastern District of Kentucky, denied the defendant’s motion for judgment of acquittal, or a new trial. The Court wrote: “Based on the foregoing, there was ample evidence from which the jury could have concluded that, on March 17 and 23, 2019, Fields employed, used, persuaded, induced, or coerced the minor victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct and that the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate commerce by any means, including computer.”  

Legal Lesson Learned: A firefighter having sex with a minor can be convicted of a federal offense if a video or photos is posted on Internet.

16-38

NJ: PENSION FRAUD – FF SENTENCED 7 YEARS IN PRISON – MARSHAL ARTS INSTRUCTOR – VIDEO OF COMPETITION

On June 30, 2020, in State of New Jersey v. Shane Streater, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that jury’s conviction of the former Camden, NJ firefighter is affirmed. The prosecution called as witnesses two medical doctors who had submitted letters in support of his disability; they told the jury that after watching the video they were never informed of his martial arts activities. The Court wrote: “Here, the State adduced abundant evidence of defendant's fraud, including the testimony of three doctors who examined him and stated defendant's actions on the videotape of his martial arts competition were inconsistent with defendant's complaints of pain and disability.”

Legal Lessons Learned: The 7-year prison sentence certainly “sends a message.”

Note: Trial Court judge also ordered the defendant to pay $82,488.22 in restitution.
See newspaper coverage:
Watch the YouTube video and TV story (March 18, 2015):
“Ex-N.J. firefighter convicted of stealing disability pension while earning black belt” (April 12, 2016):
TN: TAPE RECORDER SECRETLY PLACED UNDER TABLE FIRE HALL – TO RECORD “GOSSIP” – VIOLATION OF TN LAW – 5 FF AWARDED $10,000 EACH & ATTORNEY FEES

On May 8, 2020, in Ronald Ledford, et al. v. John Ben Sneed and Ray Wilson, Jr., the Court of Appeals of Tennessee at Knoxville, held (3 to 0) that “Defendants’ vague assertions that they would be listening were also not enough to garner consent from Plaintiffs to record their conversations via a tape recorder taped under the table.”


Legal Lessons Learned: Secretly placing tape recorders can lead to both civil, and in some states, criminal liability.

16-36

CA: FF SEXUAL E-MAILS TO 16-YR-OLD GIRL HE MET AT FIRE STATION TOUR – ALSO CONDUCT TOWARDS FEMALE FF – TERMINATION UPHELD, EMBARRASSMENT TO FD

On May 7, 2020, in Grant Seibert v. City of San Jose, the Court of Appeal of State of California, Sixth Appellate District, held (3 to 0) in unreported opinion, “Insofar as Seibert sexualized his job, his actions reasonably could be found to be disrespectful to the general public, which is rightly entitled to expect professionalism from its public servants. In addition, insofar as those actions tended to undercut the public’s trust of and respect for the Department and its members, the trial court could reasonably find that those actions were detrimental to the public service, which was a cause for discipline specified in charge No.1.”

https://www.courts.ca.gov/opinions/nonpub/H046246.PDF

Legal Lessons Learned: The firefighter’s e-mails clearly can bring embarrassment to the Fire Department.

16-35

KY: FD LIEUTENANT – INVEST. EXPOSED HIMSELF TO MINOR - PONOGRAPHY FOUND ON HIS FD COMPUTER – FIRE CHIEF [HIS FATHER] SIGNED CONSENT TO SEARCH

On May 4, 2020, in United States of America v. Robert Christopher England, U.S. District Court Judge Claria Horn Boom, Eastern District of Kentucky / Southern Division (at London) held that the FD computer was properly searched with the written consent of the Fire Chief, in agreement with recommendation of U.S. Magistrate who heard motion to suppress.
Legal Lessons Learned: FDs should have a computer use policy that allows FD to audit the contents of the computer, and to authorize others (including law enforcement) to access contents.

Note: California's wiretapping law is a "two-party consent" law. California makes it a crime to record or eavesdrop on any confidential communication, including a private conversation or telephone call, without the consent of all parties to the conversation. See Cal. Penal Code § 632. https://www.dmlp.org/legal-guide/california-recording-law

Ohio's wiretapping law is a "one-party consent" law. Ohio law makes it a crime to intercept or record any "wire, oral, or electronic communication" unless one party to the conversation consents. Ohio Rev. Code § 2933.52. Thus, if you operate in Ohio, you may record a conversation or phone call if you are a party to the conversation or you get permission from one party to the conversation in advance. That said, if you intend to record conversations involving people located in more than one state, you should play it safe and get the consent of all parties. https://www.dmlp.org/legal-guide/ohio/ohio-recording-law

MA: CAPTAIN -- CONV. 5 COUNTS LARCENY – VENDOR GIFTS – JUDGE ALLOWED PROS. TELL JURY OPENING STATEMENT HE ALSO “SWAPPED” RECRUITS CLOTHING

On April 27, 2019, in Commonwealth v. Edward A. Scigliano, Fourth, the Commonwealth of Massachusetts Appeals Court, held in a summary decision (3 to 0) that his conviction is affirmed. “The Commonwealth properly introduced evidence that the defendant previously "swapped" goods purchased by the city for other goods from which he derived a personal benefit because it "tended to rebut the defense of innocent intent and make more probable the existence of the requisite illegal intent, that of committing a larceny." during the transactions alleged in the indictments.”
https://public.fastcase.com/W/-%2B2t%2BeVuI35%2FN70vAMFZiqDSx6E0DPFzBbugd7jDu14ZTk4ABsQUj2F%2Fw3WluoM

Legal Lessons Learned: The prosecutor properly obtained Trial Judge’s permission to discuss the uncharged act of “swapping” recruit clothes.
CA: PROBATIONARY FF – FIRED DURING 1-YR PROB. PERIOD – NO RIGHT TO CIVIL SERVICE HEARING

On April 24, 2020, in Josh McCauley v. City of San Diego, the California Court of Appeal (Fourth Appellate District / Division One) held (3 to 0) in unpublished opinion, that the trial court properly granted the City’s motion to dismiss. Probationary firefighters have no civil service protection, are not covered by the Collective Bargaining Agreement, and Fire Academy Manual is not a contract of employment. Court did not discuss why he was fired, other than: “He met with the Department Chief to discuss the failure to be hired permanently. The City's attorney represented that McCauley had filed an internal grievance during his employment and it was addressed by the City.”

“McCauley acknowledges that he is not a party to any collective bargaining agreement. He claims that the Department's Basic Fire Academy Manual (Manual) constituted "an express written contract ‘with the City that governed the terms of his probationary status. He attaches a copy of the Manual to his complaint, but neither in his complaint nor in his brief on appeal does he identify any portion of that Manual that governs his probationary employment. *** Again, the plain, unambiguous words of the Manual refer only to recruits, not to probationary employees. The Manual mentions termination from the Basic Fire Academy, but nothing about probationary employees or the guarantee of a permanent job. The Manual provides neither conditions for permanent employment not entitlement to government employment. McCauley has not identified any regulations of the City or of the Department under which he could state an alternate claim.”

https://www.courts.ca.gov/opinions/nonpub/D074721.PDF

Legal Lessons Learned: Probationary firefighters are not covered by civil service or most CBAs.

Note: Court described the limited legal remedies of a probationary firefighter.

“McCauley had other remedies to pursue employment-related wrongs. ‘A probationary employee may not be rejected for the exercise of a constitutional right [citation] for engaging in an activity protected by labor statutes.’ (Trustees of Cal. State University v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1107, 1130; Bogacki, supra,5 Cal.3d at p. 778.) He had statutory rights including the right to pursue a discrimination claim under the Fair Employment and Housing Act and the right to workers' compensation in case of injury.”

16-32

NY: BULLYING – VOL. FF SUSPENDED – FIRED WHEN WALKED OUT AT START OF PRE-DISCIPLINARY HEARING

On April 23, 2020, in Andrew Lerer v. Raymond Canario, & Village of Spring Valley, & Spring Valley Fire Department, U.S. District Court Judge Louis Briccetti, United States District Court for the Southern District of New York, granted the defendants’ motion to dismiss. The volunteer firefighter, who filed this lawsuit pro se [without an attorney], showed up for his termination hearing at 6:53 pm, but walked out before it started at 7:00 pm.

“Once an employer has knowledge of some type of workplace harassment or improper conduct, ‘the law imposes upon the employer a duty to take reasonable steps to eliminate it.’ Torres v. Pisano, 116 F.3d 625, 636 (2d Cir. 1997). Under the circumstances, that defendants provisionally denied plaintiff, pending a hearing and determination, access to municipal property and opportunities to respond to fire alarms or
otherwise participate in SVFD activities does not plausibly suggest defendants exercised governmental power without a reasonable justification in the service of a legitimate governmental interest.

Legal Lessons Learned: Fire Chief acted promptly in suspending the firefighter; when he walks out of his pre-termination hearing he can hardly complain about lack of due process.

16-31

UT: RAPE AT FIRE STATION - ASSISTANT FIRE CHIEF ARRESTED – ALSO ALLEGEDLY RAPE FF -TOWN IMMUNITY

On April 22, 2020, in Whitney Otteley v. Austin James Corry and Kanosh Town, Utah, U.S. District Court Judge David Nuffer, U.S. District Court for the District of Utah, granted the Town’s motion to dismiss. Under state law, the Town enjoys governmental immunity, and cannot be sued for “negligent hiring, supervision, or retention.” The lawsuit against Austin Corry was not dismissed. [See TV Video about new charges - Austin Corry rapes of an duty firefighter: https://www.abc4.com/news/justice-files/the-justice-files-a-rape-in-rural-utah/]. Austin Corry’s father, the Fire Chief, was charged and pled guilty to obstruction of justice for not reporting her rape complaint to police.

“Under the [Governmental Immunity Act of Utah]GIA, as applied in Larsen [v. Davis County School District, Utah Court of Appeals, Nov. 30, 2017; https://cases.justia.com/utah/court-of-appeals-published/2017-20160099-ca.pdf?ts=1512166432 ] and explained above, Kanosh is immune from suit because Austin Corry's misconduct (including his assault, battery, false imprisonment, and infliction of mental anguish on Ottley) was a proximate cause of Ottley's claimed injury. Because of this, Ottley fails to state a claim against Kanosh on which relief may be granted as a matter of law.”

Legal Lessons Learned: This is terrible conduct by both the Assistant Chief and his father, the Fire Chief. [Not found any articles on outcome of former Assistant Chief’s trial.]

Note: See Dec. 3, 2019 article, “Millard County fire chief charged with raping two women will face trial in Utah County,” https://www.heraldextra.com/news/local/crime-and-courts/millard-county-fire-chief-charged-with-rape-two-women-will/article_32fa3eae-85ce-5928-a493-88a75082f506.html. “The [raped firefighter] also reportedly told Corry’s father, Scott Corry, 62, about the alleged rapes in 2018. However, Scott Corry told investigators he was “trying to protect his son and he never got around to” filing reports on the claims. He was charged in July with obstruction of justice, a second-degree felony, and official misconduct, a class B misdemeanor.”

16-30
CA: THREATENING COMMENTS TO OFFICER – OFF DUTY INCIDENT WITH HIS DOG – 48-HOUR SUSPENSIONS UPHeld

On April 22, 2020, in Michael Meoli v. San Diego Civil Service Commission, the Court of Appeal (4th Appellate District / Division One) held (3 to 0) in unpublished opinion, that the trial court properly confirmed the decision of the Civil Service Commission, that the two 24-hour suspensions were appropriate.

“[California Firefighter’s Bill of Rights] Government Code section 3253 deals with a firefighter's rights when he or she ‘is under investigation and subjected to interrogation.’ Meoli argues that City violated subdivisions(b), (g), and (h) of section 3253 during the February 2012 incident at the fire station. As we explained ante, the trial court found that the delivery of the Notice communicated to Meoli that an investigation and interrogation would take place in the future. Although Meoli acknowledges this ruling by the trial court, he argues that it was ‘not supported by the law or any reasoned analysis of the applicable statute[].’ However, Meoli does not explain this alleged error, since he fails to discuss the trial court's rulings, the applicable standard, or the evidence to support a violation of the applicable standard.”

https://www.courts.ca.gov/opinions/nonpub/D074758.PDF

Legal Lessons Learned: Threats against a FD officer are not to be tolerated; nor claims off duty that you are a police officer.

16-29

VA: SOCIAL MEDIA - ANTI-TRUMP FACEBOOK - ARRESTED D.C. PROTEST – FIRED NO HEARING – LAWSUIT PROCEED

On March 31, 2020, in Rosa Roncales v. County of Henrico, Anthony McDowell, Alec Oughton, Scotty Roberts and Eugene Gerald, U.S. District Court Judge M. Hannah Lauck, U.S. District Court for the Eastern District of Virginia (Richmond Division), reviewing the allegations by the firefighter in the Complaint, but without holding a hearing, denied qualified immunity claims of the four supervisors. “At this procedural posture, however, the Court concludes that qualified immunity does not protect McDowell, Oughton, Roberts, or Gerald from liability. The Court will deny the Motion to Dismiss as to the individual Defendants.” The County was dismissed from the case.

“Here, Roncales alleges that she never received a name-clearing hearing or the opportunity to present her case before her employment ended at the Henrico Fire Department. Specifically, Roncales claims that Defendants questioned her regarding her participation in a political protest, that she did not have the opportunity to speak to her legal counsel before questioning, that video evidence existed that would have shown she participated in only non-violent protest, that she ‘told her superiors that her legal counsel had possession of a video demonstrating" the veracity of her claims, (Compl. ¶ 34), and that Defendants used the event as a pretext to terminate her employment from the Henrico Fire Department for her political beliefs. For this claim, Roncales maintains that she was ‘deprived of the fair and unbiased opportunity for a hearing, whether name-clearing or otherwise, to rebut the Defendants' representations, and to present her side of the story.’ (Compl. ¶ 60.) Based on these allegations, Roncales sufficiently alleges her Due Process Claim.”
Legal Lessons Learned: FDs should provide a pre-disciplinary hearing prior to making a termination decision. Note: Read the U.S. Supreme Court decision in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), https://supreme.justia.com/cases/federal/us/470/532/.

16-28

MI: FIRED FOR MISCHARGING HRS, DOUBLE DIPPING – FF CLAIMS RETALIATION, VERY RELIGIOUS – CASE PROCEED

On Nov. 22, 2019, in Peter Hudson v. City of Highland Park, Michigan; Derek Hillman; Makini Jackson, the U.S. Court of Appeals for the 6th Circuit, held (2 to 1) that FF may proceed in lawsuit against the Fire Chief for retaliation for exercising his free-speech rights, and after FF filed complaint with OSHA. “At any rate, the point, at least at the pleading stage, is one of inferences—that Hillman fired Hudson for reasons other than violating the fire station’s payroll policies. Not every allegation has to substantiate a plaintiff’s claim directly…. That’s why we have circumstantial evidence.” The majority, however, rejected his “hostile work atmosphere” Title VII claim.

“For many people of faith, their religion is not an abstraction. It has consequences for how they behave and may require them to be witnesses and examples for their faith. That reality does not permit differential treatment of them because they criticize behavior on moral grounds stemming from religious convictions as opposed to moral grounds stemming from secular convictions. ‘Let firemen be firemen’ is not a cognizable defense to Title VII claims based on gender discrimination, race discrimination, or faith-based discrimination. Even so, Hudson’s disparate treatment claim fails at a minimum at the last step. He cannot show that the city’s justification for his discharge amounted to a pretextual basis for discriminating against him because of his faith. The fire department put forth a legitimate, non-discriminatory reason for treating Hudson differently. He falsified his time-sheets while other firefighters did not.”

Legal Lessons Learned: If the allegations of on duty sex, pornography, and similar items are true, the FD needs new leadership.

16-27

TN: FF OFF DUTY, POINTED FIREARM AT TWO MEN AT POLITICAL RALLY – FIRED - GIVEN “LOUDERMILL HEARING” BY FIRE CHIEF

On March 18, 2020, in Paul Zachary Moss v. Shelby County Civil Service Merit Board, the Supreme Court of Tennessee, at Jackson, held (5 to 0) that the FD provided due process to the firefighter, reversing the decision by the TN Court of Appeals. In addition to the November, 2013 aggravated assault with firearm, the Fire Chief during the pre-termination Loudermill hearing also inquired about police records which showed that in March 2011, police arrested Mr. Moss on charges of public intoxication and possession of a firearm while under the influence of
alcohol. Police records also showed that in October 2012, a police officer responded to a domestic violence call during which Mrs. Moss stated that Mr. Moss had assaulted her.

“Based on the pre-termination Loudermill notice, the questions during the Loudermill hearing, and the contents of the termination letter, we conclude that Mr. Moss had sufficient notice that his conduct during the November 2013 altercation and his answers about the 2011 and 2012 incidents were reasons for his termination. Mr. Moss received adequate notice of the factual allegations against him and had an opportunity to prepare for his hearing before the Board. His contention that the Fire Department violated his due process rights lacks merit.” http://www.tncourts.gov/sites/default/files/moss.paul_.opn_.pdf

Legal Lessons Learned: The FD wisely issued the firefighter a written notice of potential violations of FD policies, and provided a Loudermill meeting with the Fire Chief and Deputy Chief.

16-26

IN: FF REPEATEDLY LATE FOR WORK & ABSENT WITHOUT LEAVE – PROGRESSIVE DISCIPLINE – TERMINATION UPHELD

On March 6, 2020, in Kevin D. Jones v. City of Muncie Fire Merit Commission, the Court of Appeals of Indiana, held (3 to 0) that the trial court properly upheld the Commission.

“We, therefore, conclude that there was substantial, relevant evidence presented to support the decision by the Commission to terminate Johanns’s employment. The evidence presented was sufficient to lead a reasonable person to support the conclusion to terminate the employment of Johanns, and the decision was not arbitrary and capricious. The trial court did not err in upholding the Commission’s decision. *** The Commission found that Johanns’s overall performance as a firefighter was poor, that he neglected his duties as a firefighter, disobeyed orders, and was absent without leave and concluded that Johanns’s employment should be terminated.” https://www.in.gov/judiciary/opinions/pdf/03062003jsk.pdf

Legal Lessons Learned: The FD followed progressive discipline, and documented the poor performance issues.

16-25

AR: PROB. FF – WARNED OF POOR JOB PERFORMANCE – FIRED – VERY WELL DOCUMENTED – NO RETALIATION FOR HIS WORK COMP CLAIM

On March 5, 2020, in Michael Burroughs v. City of Tucson, the U.S. Court of Appeals for the Ninth Circuit (San Francisco), held (3 to 0) in an unpublished decision that the trial court properly granted summary judgment to the City. He was repeated informed of his “Job In Jeopardy” status after barely graduating from the Training Academy. For example: “On or about October 19, 2015, Plaintiff was given TFD's Performance Evaluation for Probationary Firefighter. Plaintiff's evaluation indicated that he needed improvement on eight (8) out of seventeen (17) categories for which he was provided feedback.” He was terminated on November 10, 2015 [don’t know when he filed Workers Comp claim.]

When Burroughs hurt his back at the fire academy, a City physician evaluated his injury, diagnosed him with a ‘lumbar strain,’ and released him back to work without restriction. Another City physician reached the same conclusion two days later when Burroughs complained of difficulty sitting. And finally, after yet another medical evaluation deeming him fit for duty, Burroughs graduated from the fire academy and started working at his first station. Faced with these medical opinions based on physical examinations, Burroughs’s only contrary evidence is his own conclusory self-assessment. Not quite a genuine factual dispute.”

Legal Lessons Learned: The FD did a great job documenting the poor work performance.

16-24

MI: POLICE CHIEF FIRED – MERGER TWO 911 SYSTEMS - POSTED TAXPAYERS “GETTING THE SHAFT” — LAWSUIT TO PROCEED

On March 2, 2020, in Chad Hayse v. City of Melvindale, U.S. District Court Judge Linda V. Parker, Eastern District of Michigan (Southern Division) denied the City’s motion for summary judgment. The City fired the Police Chief after he posted comments on Facebook page in opposition to the merger of the City’s 911 dispatch with the City of Dearborn’s dispatch; hot issue on which the City Council of Melvindale was going to soon vote.

“In 2016, City Council readied itself to vote on the proposed merger of Melvindale's and the City of Dearborn's police dispatch systems. Discussions and debates abounded in public meetings, several of which were held over a two-month period. *** Based on the record, the Court is unable to conclude that Defendants reasonably predicted that the ‘shaft’ comment would cause disruption within the police department. One reason is that the "shaft" comment did not contain ‘particularly inflammatory,’ ‘abusive,’ or ‘exceptionally insulting’ language that could stir controversy among members of the police department. See Rodgers, 344 F.3d at 601. Another reason is that the public's reaction to the ‘shaft’ comment, as detailed in Defendants' arguments, provides little insight into what predictions Defendants made about how the comment would disrupt the police department. Accordingly, the Court finds that the balancing test weighs in Plaintiff's favor and the ‘shaft’ comment was constitutionally protected activity.”

Legal Lessons Learned: Emergency responders, including Fire & EMS, must be very cautious posting comments on any internal FD issues. In this case, the issue was clearly an public matter, and the Court reviewed the U.S. Supreme Court’s “balancing test” and the fact that the Facebook post “was one of many made on a Facebook page visited by many Melvindale residents.”
TX: Off-duty FF slapped 70+ year old, complained FF’s kids blocking view – hearing officer reversed termination

On Jan. 23, 2020, in City of Fort Worth v. Shea O’Neill, Court of Appeals for Second Appellate District of Texas at Fort Worth (vote 3 to 0), rejected the City’s appeal from the Hearing Officer’s finding that firefighters due process rights were violated when FD internal affairs failed to conduct an adequate internal investigation. Case remanded to trial court, however, on whether Hearing Officer improperly conducted Internet search about medication victim uses [aspirin and Lipitor] that could cause nosebleed.

“In support of its appellate issue, the City first asserts that the hearing examiner’s decision was procured by unlawful means because she relied on evidence not presented at the hearing—specifically, her independent Internet research on the side effects of aspirin and Lipitor, both of which Woods testified to taking daily. According to the hearing examiner's research, both medications can cause ‘unusual bleeding,’ and Lipitor can ‘specifically cause nosebleed.’”

Legal Lessons Learned: Courts are very reluctant to overturn decision of a Civil Service hearing officer, who has conducted the hearings and personally observe the witnesses.

TN: Social media – Nashville PD officer’s Facebook posts - PD killing driver MN - “Grossly unprofessional” - firing upheld

On Dec. 20, 2019, in Anthony Venable v. Metropolitan Government of Nashville and Davidson County, Chief Judge Waverly D. Crenshaw, Jr., U.S. District Court, Middle District of Tennessee (Nashville Division) granted Nashville’s motion for summary judgment and dismissed the lawsuit by the former police officer, finding his Facebook comments “grossly unprofessional.”

“In addition to the “not bring discredit” language, the MNPD policy contains an explanation of why police officers are held to a higher standard, and why inappropriate conduct can be detrimental to the department. An ordinary person, exercising ordinary common sense, could understand that Venable’s inflammatory Facebook comments, where he drew upon his law enforcement background, would reflect negatively on the MNPD and constitute a violation of the Conduct Unbecoming policy. Any doubt about this is eliminated by warning statements of other participants that his comments were ‘grossly unprofessional,’ and could get him ‘in serious trouble.’
Legal Lessons Learned: Fire & EMS Departments should have a policy that warns personnel that Social Media posts that adversely reflect on the Department can lead to discipline, including termination. See Phoenix FD’s Social Media policy: https://www.phoenix.gov/firesite/Documents/fire_mp_10518.pdf

16-21

OH: LT. DEMOTED / SUSPENDED – UPHELD BUT TOWNSHIP MINUTES ON REASON FOR GOING INTO EXEC. SESSION NEED CLARIFICATION

On Dec. 9, 2019, in Douglas Bode v. Concord Township, the Ohio Court of Appeals for the Eleventh District (Lake County) upheld the demotion of part-time Lieutenant to part-time firefighter / paramedic, and his suspension for six months, but found technical violation of Open Meeting Act since minutes of the Township public meeting did not reflect the reason for going into executive session.

“We determine the Board committed a technical violation of Ohio’s Open Meetings Act (the ‘OMA’) so that an injunction ordering the Board to comply with the OMA is appropriate, but we do not invalidate Mr. Bode’s suspension and demotion approved by the Board. *** Here, it is undisputed that the meeting minutes were deficient in identifying the purpose of the executive session with regard to Mr. Bode. No reason for entering executive session was stated; therefore, the Board has failed to comply with R.C. 121.22(G)(1). https://www.supremecourt.ohio.gov/rod/docs/pdf/11/2019/2019-Ohio-5062.pdf

Legal Lessons Learned: Minutes of public meetings, prior to going into Executive Session, should careful be prepared to avoid costly litigation.

16-20

OR: SHORTLY AFTER UNION FORMED - FD STARTED USING PRIVATE INVESTIGATOR, SUPERVISOR NOTES – UNFAIR LABOR PRACTICE

On Dec. 5, 2019, in Crook County Firefighters Association, IAFF Local 5115 v. Crook County Fire & Rescue, the Oregon Employment Relations Board found that the Fire Department “committed an unfair labor practice” after the Local was formed in September, 2017.

“To briefly summarize: after the employees organized, the District started using a private, third-party investigator to investigate some, but not all, complaints or concerns about employee conduct, and started using supervisory notes to more comprehensively and formally document employee conduct, and coaching and counseling. When employees expressed concerns about the potentially negative employment implications of the District’s actions, or perceived differences in how Association supporters were being treated, and asked for explanations, the chiefs, on multiple occasions, expressly attributed the employer’s actions to ‘the union.’ Given the parties’ history, including the fact that the employees had only recently organized, Association-represented employees could reasonably fear that exercising their PECBA-
guaranteed rights would result in undesired changes (i.e., increased formality and documentation), as well as heightened scrutiny and less favorable judgments from their supervisors.”

Legal Lessons Learned: New disciplinary processes implemented shortly after a union has been formed can lead to a “unfair labor practice” complaint. Under Oregon statutes, it is an unfair labor practice to: “(a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 (Definitions for ORS 243.650 to 243.782) to 243.782 (Representation by counsel authorized).”

LA: FF “BILL OF RIGHTS” VIOLATED – FF INTERVIEWED BY SENIOR FD OFFICER AFTER ARREST FOR ROAD RAGE

On Dec. 4, 2019, in Jonathan Farrelly v. Jefferson Parish East Bank Consolidated Fire District, the Fifth Circuit Court of Appeals held (3 to 0) that FD violated the Firefighter Bill of Rights.

“Without the presence of counsel, Farrelly was asked to discuss facts relating to a pending criminal prosecution. While the Firefighter Bill of Rights provides that statements made during the course of an administrative investigation shall not be admissible in a criminal proceeding, Farrelly was not informed of these rights at the time of the meeting. La. R.S. 33:2181(B)(7). He was not advised whether his disclosures to his employers could adversely affect his impending criminal case. He may have felt that he had to answer the questions of his superiors as Department Rules and Regulation, Article X Section 3:06 states ‘[a]ny member who, when so directed by authority, refuses to answer questions or render statements, material, etc. relevant to any Department investigation shall be subject to disciplinary action.’ Furthermore, when the Department seeks information regarding conduct that results in an arrest, the details of the conduct can be confirmed through the police report.”

Legal Lessons Learned: When the FF returned to work, he should have only been interviewed by his immediate supervisors, who in turn could advise the senior officers what they had learned. See the Louisiana statute: FIRE EMPLOYEE’S RIGHTS:

(2) "Interrogation" includes but is not limited to any formal interview, inquiry, or questioning of any fire employee by the appointing authority or the appointing authority's designee regarding misconduct, allegations of misconduct, or policy violation. An initial inquiry conducted by the fire employee's immediate supervisors shall not be considered an interrogation.
**MI: FF COMPLAINED PORN, OSHA VIOLATIONS – FIRED FOR MISCHARGING TIME - “RETAIATION” CLAIM REINSTATED**

On Nov. 22, 2019, in *Peter Hudson v. City of Highland Park, Michigan, Derek Hillman; Makini Jackson*, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that lawsuit should be reinstated against Fire Chief Dereck Hillman.

“As to [Fire Chief Dereck] Hillman, Hudson’s claim stands on firmer ground. While the question is close, his amended complaint contained enough plausible allegations to move to the discovery stage of the case. For five years, Hudson openly criticized his co-workers’ behavior because he felt it hampered their ability to fight fires. Hillman knew about these comments (some concerned his behavior) and tolerated other firefighters’ dereliction of duty (some of them missed calls to respond to fires). As time passed, Hudson put his complaints into action. A year before his discharge, he filed a complaint with the Occupational Safety and Health Administration, alleging that the firefighters’ cavorting led to deficiencies in the station’s equipment. Hillman, at some point, told another firefighter that he had grown tired of Hudson’s complaints. Hillman eventually found a way to get rid of Hudson: He had falsified his timecard. Hillman fired him on that basis, even though he knew another firefighter had done the same thing. Hudson tells us why: ‘[Hillman] objected to Hudson’s religious convictions and wanted to stop Hudson[’s] outspokenness against the immorality of Hillman and the firemen.’ Id.at 15. Considering these allegations as a whole, it’s fair to say that they meet the notice pleading requirements of plausible allegations that Hillman fired Hudson because of his speech.” [https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0286p-06.pdf](https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0286p-06.pdf)

**Legal Lessons Learned:** Federal courts will carefully review claims of “retaliation” when firefighter is fired after an internal complaint, or OSHA complaint, has been submitted by the firefighter.

16-17

**TX: FF’S INTERNAL COMPLAINTS ABOUT FIRE CHIEF - NOT PROTECTED FIRST AMENDMENT – NOT “PUBLIC CONCERN”**

On Oct. 10, 2019, in *Billy Fratus v. The City of Baumont*, the Court of Appeals, Ninth District of Texas at Beaumont, held (3 to 0) that trial court properly dismissed the firefighter’s lawsuit alleging he was fired [later reinstated] in retaliation for his internal complaints.

“The speech Fratus claims is protected under the Texas constitution is (1) that he ‘joined the public outcry against Huff when she illegally fired’ a firefighter, (2) he ‘made it quite clear and said that he opposed Huff’ or any command officer sexually harassing members of the department,’ and (3) he ‘publicly opposed Huff’s public, on duty support’ of a former firefighter in a criminal prosecution. According to the City, Fratus failed to allege how these instances of speech constituted a matter of public concern. *** On this record, we conclude that Fratus has failed to plead a prima facie free speech claim because he failed to meet his burden of showing he engaged in speech primarily as a citizen involving a matter of public concern.” [http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=c3f113f2-1ba2-49ff-a2ab-1b5420c141ac&coa=coa09&DT=Opinion&MediaID=ad82a5f3-c7c6-4b28-8fe8-0de313580d94](http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=c3f113f2-1ba2-49ff-a2ab-1b5420c141ac&coa=coa09&DT=Opinion&MediaID=ad82a5f3-c7c6-4b28-8fe8-0de313580d94)
Legal Lessons Learned: Firefighters and other public employees have limited First Amendment rights, unless speech relates to items of “public concern.”

An example on an item that would be covered – public comments on proposed tax levy. See the U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 (1968) (establishing the so-called “balancing test”), where the Court reversed the termination of a teacher who sent letter to local newspaper about proposed school board tax levy: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In these circumstances, we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

https://supreme.justia.com/cases/federal/us/391/563

TX: “LAST CHANCE AGREEMENT” - BREACHED WITHIN TWO YEARS, SICK LEAVE ABUSE – FIRED – LAWSUIT DISMISSED

On Oct. 3, 2019, in Michael Scott Nix v. City of Beaumont, Texas, the Court of Appeals, Ninth District of Texas ay Beaumont, the Court held (3 to 0) that trial court properly dismissed his lawsuit seeking a declaration that the City violated his rights when he was “indefinitely suspended” [terminated] on Sept. 13, 2019 for sick leave abuse during the two-year period following the Last Chance Agreement of April 2, 2015 where he served a 90-day suspension for prior disciplinary conduct.

“Importantly, Nix agreed in writing to voluntarily accept his 2015 disciplinary suspension, with no right to appeal the terms and conditions of the Agreement or the Chief’s decision to indefinitely suspend his employment in 2015. See Tex. Loc. Gov’t Code Ann. § 143.052(g). When Nix accepted the Agreement in 2015, he had the opportunity to refuse the Chief’s offer and appeal his suspension to the [Civil Service] Commission; however, Nix agreed to waive his right to appeal, including the right to appeal the Chief’s 2017 decision determining that Nix had violated the Agreement and reinstating his indefinite suspension.”


Legal Lessons Learned: Last Chance Agreements are an effective method to give a firefighter “one last chance.”

16-15

IL: RESIDENCY – FF FIRED – PAST THREE YEARS DID NOT RESIDE IN VILLAGE – MAIL DROP LOCATION IS NOT RESIDENCY

On May 29, 2019, in John Cannici v. Village of Melrose Park, the Appellate Court of Illinois, First District, 2019 IL App (1st) 181422-U, held (3 to 0) that the fire fighter was properly terminated for violating residency ordinance.
The Board did not indicate that it found fault with Cannici’s earlier arrangement where he lived in the [Melrose Park] Norwood house for a majority of the week and would spend his weekends at the Orland Park house. Although this arrangement included physical absence from the Norwood house for ‘some’ of the time, this was not a violation of the residency ordinance as he still lived in the Norwood house for the majority of his time and treated it as his primary home or abode. However, when he leased the Norwood house to the Cichons, he no longer used the Norwood house as his primary home and spent practically no time in the Norwood house, except the time spent picking up his mail.”

Legal Lessons Learned: Some states, such as Ohio, have enacted statutes that have set aside municipal residency requirements.


“R.C. 9.481(B)(1) states that ‘no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.” The issue in this case is whether R.C. 9.481 was enacted pursuant to the authority granted to the General Assembly by Section 34, Article II of the Ohio Constitution. If it was so enacted, its provisions override any conflicting law of a political subdivision, including residency requirements imposed by municipalities pursuant to the Home Rule Amendment, Section 3, Article XVIII of the Ohio Constitution. We hold that R.C. 9.481 was enacted pursuant to the authority granted by Section 34 and that the local laws before us in this case therefore cannot stand.”

Ohio communities can adopt ordinance requiring firefighters and police officers to live in the county, or an adjacent county.

9.481 Residency requirements prohibited for certain employees.

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state.

http://codes.ohio.gov/orc/gp9.481

9.61 Residency not required for fire chief.

(B) Nothing in the Revised Code requires, or shall be construed to require, that the fire chief of a firefighting agency reside in the territory of the firefighting agency. http://codes.ohio.gov/orc/gp9.61
On April 10, 2019, in State of Florida v. Armando Socarras, 2019 WL 1548623 (Fla. Dist. Ct. App. 2019), the Third District Court of Appeal, held (3 to 0) that the officer’s first two statements to Internal Affairs are admissible. “Finally, Socarras did not reference the missing currency in his initial statement, and, unprompted, volunteered an exculpatory explanation in his second statement. As in Murphy, Socarras ‘apparently felt no compunction about adamantly denying’ he engaged in criminal activity, strongly suggesting any subjective belief of employment sanctions ‘did not overwhelm his resistance.’ 465 U.S. at 438, 104 S. Ct. at 1148. 


Legal Lessons Learned: When conducting an internal investigation, advise the “target” of the investigation of both their Miranda rights to remain silent, and their Garrity rights that their statements may lead to disciplinary action.

See, for example, Lansing Fire Department advise on Garrity rights: FIFTH AMENDMENT APPLIES TO INTERROGATIONS OF PUBLIC EMPLOYEES (GARRITY RIGHTS):

Public employees have certain constitutional rights that apply in their employment that may not apply to private employees. For example, in Garrity v. New Jersey, the Supreme Court held that statements obtained in the course of an investigatory interview under threat of termination from public employment couldn’t be used as evidence against the employee in subsequent criminal proceedings. If, however, you refuse to answer questions after you have been assured that your statements cannot be used against you in a subsequent criminal proceeding, the refusal to answer questions thereafter may lead to the imposition of discipline for insubordination. Further, while the statements you make may not be used against you in a subsequent criminal proceeding, they can still form the basis for discipline on the underlying work-related charge. To ensure that your Garrity rights are protected, you should ask the following questions: 1) If I refuse to talk, can I be disciplined for the refusal? 2) Can that discipline include termination from employment? 3) Are my answers for internal and administrative purposes only and are not to be used for criminal prosecution?

http://www.iaff421.org/?zone=/unionactive/private_view_page.cfm&page=Know20Your20Rights21
“The totality of the evidence, viewed in conjunction with the caselaw, weighs against formation of an attorney-client relationship. Written documents identify Mr. Brown as ‘attorney for the union.’”
https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2018cv2084-60

Legal Lessons Learned: IAFF Local’s attorney is not personal attorney for grievant.

16-12

**MA: NEPOTISM - FIRE CHIEF’S NIECE AND BROTHER ON FD – RESIGNED PENDING AN INVESTIGATION**

On Jan. 19, 2019, in Kevin Robinson v. Town of Marshfield, et al, U.S. District Court Judge Nathaniel M. Gorton granted the Town’s motion for summary judgment, and dismissed the former Fire Chief’s lawsuit:

> “The Chief has not met his burden of showing intentional interference. First, defendants’ conduct does not rise to the level of spiteful or malignant purpose because there was a legitimate interest in temporarily removing the Chief during the investigation of his alleged ethical misconduct. Moreover, even if this Court assumes arguendo that the Chief has met his prima facie burden of showing improper motive through age discrimination, the Chief has failed to show that such discrimination was the controlling factor in the alleged interference.”


Legal Lessons Learned: Fire Chiefs, in states that do not prohibit close family members on their FD, must be extremely careful to avoid even an “appearance” of conflicts of interest.

See list of state statutes on Nepotism: “Some states may take a broader approach by denying any relative of a qualifying official from being hired by the same branch of government. Other states might more narrowly prevent a public official from having direct supervisory or hiring authority over a relative. A legislator even advocating on behalf of a relative before a hiring or appointing authority might be a violation in some states.”
See also Ohio Ethics Commission – Information Sheet No. 1, RESTRICTIONS ON NEPOTISM OR HIRING FAMILY MEMBERS: https://www.ethics.ohio.gov/education/factsheets/InfoSheet1-Nepotism.pdf

16-11

**NJ: STATE POLICE LAB OFFICER INDICTED; FALSELY CERTIFIED HE HAD CALIBRATED DUI EQUIPMENT**

On Nov. 13, 2018, in State v. Eileen Cassidy, the New Jersey Supreme Court held: “The Court considers the admissibility of breath test results produced by Alcotest machines not calibrated using a thermometer that produces temperature measurements traceable to the standards set by the National Institute of Standards and Technology (NIST)…. The Special Master determined that the State had not shown that other states’ practices revealed general
acceptance of the reliability of Alcotest results without the use of a NIST-traceable thermometer. Because the Special Master’s findings are supported by substantial credible evidence in the record, the Court adopts them.”


Legal Lessons Learned: False certifications can lead to unwarranted convictions, and criminal charges. EMS personnel must likewise follow EMS protocols, or patient injury or death may occur; false EMS run reports can also lead to termination of employment and even criminal charges.

16-10

TN: FF REINSTATED - SCUFFLE AT OFF-DUTY RALLY / FIREARM - REINSTATED – CHARGES NOT PROVEN

On Oct. 10, 2018, in Paul Zachary Moss v. Shelby County Civil Service Board, the Court of Appeals of Tennessee (at Jackson) held (3 to 0) that the Civil Service Board is reversed, and firefighter is reinstated to Shelby County Fire Department.

“Appellant contends that the decision upholding his termination should be reversed due to a violation of his due process rights. We agree and reverse…. Further, [Mr. Moss on appeal noted] that the ‘two charges asserted in the Loudermill notice were proven to be without factual basis as Chief Benson and Chief Burress both acknowledged that Mr. Moss gave notice of being taken to the Memphis Police Department on the night of the events and Mr. Moss had not been convicted of a felony.’” http://www.tsc.state.tn.us/sites/default/files/mosszacharyopn.pdf

Legal Lessons Learned: Due process requires proof of the specific charges; if the FD had also included a charge of “conduct unbecoming” this case may have had a different result.

16-9

TX: FREE SPEECH - PD OFFICER LAWSUIT MAY PROCEED - FIRED ORGANIZING POLICE ASSOCIATION  [also filed, Chap. 1]
On Aug. 31, 2018, in Marcus Mote v. Debra Walthall, the U.S. Court of Appeals for 5th Circuit held (3 to 0) that Police Chief Debra Walthall is not entitled to qualified immunity, and Officer Mote’s lawsuit against her may proceed. Officer Mote sought before he was fired to organize police officers with the City of Corith, TX into a “Corith Police Officers Association” [no collective bargaining rights under TX law], affiliated with the Texas Municipal Police Association. The Court wrote,

“The First Amendment protects the right of all persons to associate together in groups to ‘advanc[e] beliefs and ideas.’ Put another way, ‘the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests.’ When groups gather together for this purpose, ‘it cannot be seriously doubted’ that they comprise associations protected by the First Amendment. *** We conclude that Mote’s right to speak in furtherance of forming the CPOA was clearly established as an integral part of his association rights. *** We agree with the district court that Mote’s association and speech rights to engage in the activities he alleged were clearly established. We therefore DISMISS the appeal.”


Legal Lessons Learned: Very strong opinion concerning free speech rights of public employees. Fire & EMS departments should adopt a “Social Media” policy that recognizes free speech rights, but also cautions members to not publicly discuss internal matters.

16-8

FL: TWO DISPATCHERS FIRED – DID NOT ALERT POLICE OF “HIGH HAZARD” PERSON – POLICE OFFICER KILLED

On June 13, 2018, in Darryl Newman, Gwendolyn Forehand v. Consolidated Dispatch Agency, the U.S. Court Of Appeals for the 11th District (Atlanta, GA), held (3 to 0) in an unpublished opinion:

“We are unpersuaded by the Appellants’ argument that their termination was arbitrary because there was no CDA [the Agency] protocol requiring them to check the ‘premises hazard’ tab, they were never warned of a requirement to look at ‘premises hazards,’ and no other PSCOs had been fired for failure to access the tab. Even if clicking on the tab was discretionary, the Appellants were nevertheless required to gather and disseminate pertinent information, pertinent information was available to them, and they failed to access it. They were aware of this responsibility based on their two decades of experience, and they knew how to access the ‘premises hazard’ tab. Moreover, there is no evidence that any other PSCO’s failure to open the tab resulted in the death of a first responder.”


Legal Lessons Learned: Fire, EMS and Police must be warned of high hazard locations. Please share this case with your 911 Dispatch agency, and confirm they have a protocol in place and it is followed 100% of time.

**16-7**

**PA: DOT EMPLOYEE FIRED FOR FACEBOOK POSTS ON BAD SCHOOL BUS DRIVERS – REINSTATED** [also filed, Chap. 1]

On June 12, 2018, in Rachel L. Carr v. Commonwealth of Pennsylvania / Department of Transportation and Civil Service Commission, the Commonwealth Court of Pennsylvania held (3 to 0) that the employee’s FACEBOOK posts about local school bus drivers were “inappropriate” but were protected since it “touched on a matter of public concern.” The Court wrote: “After a thorough review of the record and a conscientious analysis of the factors articulated by the United States Supreme Court, we conclude that the Department’s generalized interest in the safety of the traveling public does not outweigh Carr’s specific interest in commenting on the safety of a particular bus driver. While Carr’s comments are undoubtedly inappropriate, such comments still receive protection under the First Amendment.”


Legal Lessons Learned: Fire & EMS Departments should have a Social Media Policy that clearly advises personnel that their “Free Speech rights” are limited when discussing FD internal matters.

**16-6**

**TX: CAPTAIN SUPENDED FOR NOT SUBMITTING DOCTOR’S REPORT – REVERSED, FD FAILED TO DISCIPLINE IN 180 DAYS**

On April 17, 2018, in Steven Dunbar v. City of Houston, the State of Texas in the Fourteenth Court of Appeals, held that the Captain’s 10-day suspension is reversed. The “Department was aware of the violation not later than August 2014, and thus, his suspension more than 180 days later is void.” [https://cases.justia.com/texas/fourteenth-court-of-appeals/2018-14-17-00156-cv.pdf?ts=1523970132](https://cases.justia.com/texas/fourteenth-court-of-appeals/2018-14-17-00156-cv.pdf?ts=1523970132)

Legal Lessons Learned: Texas statute requiring discipline within 180 days must be strictly followed; the clock begins to run when the department FIRST becomes aware of the violation.
TN: FIREFIGHTER FIRED FOR MAKING SEXUALLY HARASSING PHONE CALLS ON DUTY – NO RETALIATION

On March 23, 2018, in Joseph Sweat v. City of McMinnville, the Court of Appeals of Tennessee At Nashville, held (3 to 0) that the trial court properly dismissed the firefighter’s lawsuit, since he was unable to prove that the City’s proffered reasons for the discharge was pretextual, including:

“Although Plaintiff never acknowledged that he made sexually harassing phone calls, he admitted in his deposition that at one time, firefighters kept a ‘list on the desk of the fire station’ containing the names of single women that they had gotten off the internet, and that he called one of these women ‘to talk.’”

Legal Lessons Learned: FD may impose discipline, even if the firefighter is one of the 27 firefighters who signed memo about safety issues.

16-4

RI: FF VIDEOTAPED WEIGHT LIFTING – DISABILITY PENSION BENEFITS TERMINATED [also filed, Chap. 6]

On Feb. 21, 2018, in John Sauro v. James Lombardi, in his capacity as Treasurer of the City of Providence, et al., the State Supreme Court held, “we conclude that the decision of the trial justice declaring that the plaintiff’s pension benefits should be reinstated and he should be placed on a waiting list to resume active service was erroneous, overlooked material evidence, and was clearly wrong.”

Legal Lessons Learned: Accidental disability pension benefits are for those with a continuing work-place injury; cases like this lead to public perception of pension fraud.


16-3

WA: CAPTAIN FIRED, INTERNAL E-MAILS ON RELIGION – LAWSUIT REISTATED, NO FD POLICY

On Jan. 25, 2018, in Jonathan J. Sprague v. Spokane Valley Fire Department, et al., the Supreme Court of the State of Washington, held (5 to 4) that

“Sprague has met his initial burden to show that SVFD’s restrictions on his speech violated the First Amendment. On remand, the burden will shift to SVFD to show by a preponderance of the evidence that it
would have reached the same decision as to respondent's employment termination even in the absence of the protected conduct.”

Legal Lessons Learned: FDs should have a written electronic communications policy, including prohibition on e-mails that can be disruptive to workplace.

16-2

IN: STATE BOARD REVOKES DEPUTY CHIEF’S FF CERTIFICATES – CHILD EXPLOITATION & PORN CONVICTION

On Jan. 17, 2018, in State Of Indiana Board Of Firefighting And Personnel Standards v. John T. Cline, the Court of Appeals of Indiana held that the Board’s decision to revoke his certifications as a Firefighter was affirmed, since he failed to file a timely appeal.

“To effect statutory compliance, Cline was required to file the agency record or file a motion for an extension of time by May 9, 2016. He did not do so and the trial court should have dismissed the petition for judicial review.”

Legal Lessons Learned: In filing an appeal, deadlines must be met unless there are extenuating circumstances.

16-1

IL: SOCIAL MEDIA POSTS - DEPUTY FIRE CHIEF FIRED AFTER “POLITICAL COMMENTARY” ON FACEBOOK

On Jan. 11, 2018, in Richard Banske v. City of Calumet City, U.S. District Court, Northern District of Illinois (Case No. 17C5263), Judge Harry D. Leinenweber granted City’s motion to dismiss.

“[A] policymaking employee may be discharged ‘when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.’ Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske's at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted.”

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the “balancing test” of U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 (1968).
Pickering decision: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”

https://supreme.justia.com/cases/federal/us/391/563/
**Chap. 17 Arbitration, Mediation, including Labor Relations.**

17-6

**OR: $25M BUDGET SHORTFALL – UNION PRES. AGREED TO STAFFING, CHANGES - 26 FF JOBS SAVED – UNFAIR LABOR CHARGE DISMISSED**

On Sept. 24, 2020, in Portland Fire Firefighters’ Association, IAFF Local 43 v. City of Portland, the Employment Relations Board of the State of Oregon, held that union is bound by its agreement not to file contest to budget cuts and eliminating Dive Team, transferring Safety Chief and Chief Investigator to management positions, and other management changes. The FD developed its proposed budget through a budgetary advisory committee (BAC). The Union's president, Alan Ferschweiler, served on the BAC. Between May 9 and approximately May 23, 2013 Ferschweiler met three times with Siegel, the mayor's budget liaison, to discuss and negotiate how the Bureau would implement the budget cuts, including consideration of the availability of a federal grant (the SAFER grant) that might fill budget gaps. Fire Chief Janssens attended one of those meetings.

"Thus, the City and the Union agreed to the following terms: (1) two double companies would be consolidated into single companies with each station's truck and engine being replaced with a quint; (2) two additional RRVs [Rapid Response Vehicles] would be added (for a total of four); (3) the Union would not oppose or contest these changes; (4) the bargaining unit members would retain their COLA; (5) all stations would be kept open; and (6) the City would apply for the SAFER grant, notwithstanding the mayor's earlier concern that a short-term funding mechanism was merely a "band-aid," with the understanding that receiving the grant would prevent 26 bargaining unit members from being laid off.

***

The Union never requested to bargain about any of the operational changes agreed to above, which are also the subject of this unfair labor practice complaint.

***

Finally, we disagree with any contention that the Union should prevail on a (1)(e) unilateral change claim where the Union agreed not to contest those unilateral changes. Rather, as set forth above, we conclude that such an express action precludes the filing of a (1)(e) unilateral change claim. In reaching this conclusion, we reiterate that, unlike other budget discussions, the agreement here included a Union agreement not to contest the specific operational changes that are now the bases for the (1)(e) claim."

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Legal Lessons Learned: Unfair Labor Practice complaint properly dismissed; Union President was active participant in budget process.
**NJ: FD REORGANIZED - 4 NEW LT. POSITIONS – REVERSED ARBITRATOR – NOT ENTITLED TO “ACTING CAPTAIN” PAY**

On June 25, 2020, in Borough of Carteret v. Firefighters Mutual Benefit Association, Local 67, the Superior Court of New Jersey, Appellate Division held (2 to 0; unpublished decision) that the trial judge improperly upheld the Arbitrator’s award of “acting Captain” back pay to the four Lieutenants. Under the Collective Bargaining Agreement in effect when the Lieutenants were hired, senior firefighters who filled in for Captains were paid the Captains hourly rate. When the Union filed the Grievance, the four new Lieutenants have been working for the past four years on the Lieutenant’s pay ($1,500 per year above FF pay) and never requested “Acting Captain” pay when fulfilling a Captain’s shift duties. The Court held, “It is not insignificant the arbitrator rejected the Borough’s ‘past practice’ argument and gave virtually no consideration to the lieutenants performing their job duties, including acting in the place of a fire captain in his or her absence, for four years without a request for any pay beyond that to which they were entitled under the Borough’s salary ordinance.”


Legal Lessons Learned: If FD is reorganizing with new Lieutenant positions, negotiate an amended Collective Bargaining Agreement so that the City, the Union and all personal have a clear agreement on the pay and duties of the new Lieutenants, and whether they are eligible for “Acting Captain” pay.

**TX: HOUSTON FD – 3 FFs FAILED PARAMEDIC SCHOOL – FIRED, NO ADMIN APPEAL - ARBITRATOR ORDERS RE-HIRE**

On March 31, 2020, in City of Houston v. Houston Professional Fire Fighters’ Association, Local 341, the Texas Fourteenth Court of Appeals held (3 to 0) that the trial court properly upheld the Arbitrator’s decision. The grievance was filed after the FD in 2014 for the first time fired three permanent, non-probationary firefighters without an administrative appeal “for failure to achieve paramedic certification.” The arbitrator held that the grievance was filed timely, that the FD changed a working condition in breach of the CBA, and the appropriate remedy was reinstatement of three firefighters.

“The City asserts the arbitrator had no jurisdiction to order reinstatement of the terminated employees because the CBA did not specifically grant the arbitrator the authority to reinstate…. Texas courts likewise have reached the conclusion that ‘an arbitrator has broad discretion in fashioning an appropriate remedy.’ Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc., 446 S.W.3d 58, 82 (Tex. App.—Houston [1st Dist.] 2014), aff’d, 518 S.W.3d 422 (Tex. 2017); see Daniewicz v. Thermo Instrument Sys., Inc., 992 S.W.2d 713, 718 (Tex. App.—Austin 1999, pet. denied) (‘[A]rbitrators have traditionally enjoyed broad leeway to fashion remedies.’). In the CBA, the parties do not prohibit reinstatement as a remedy. The common-law grounds for vacating an arbitration award are exceedingly narrow and do not include an arbitrator’s error in applying the law. See Jefferson Cty., 546 S.W.3d at 674. We conclude that the arbitrator did not exceed her authority in
Legal Lessons Learned: Arbitrators have broad authority to determine timeliness of a grievance, and appropriate remedy for breach of CBA.

17-2

NY: NEW FD PARAMEDIC TRAINING – UNION ALLEGES BREACH OF CBA – GRIEVANCE CAN GO TO ARBITRATION

On Oct. 30, 2019, in Matter Of City of Yonkers v. Yonkers Fire Fighters, Local 628, the Supreme Court of New York, Appellate Division (Second Judicial District), held 5 to 0 that a Judge in Westchester County (dated September 20, 2016) improperly granted the City’s petition to permanently stay arbitration.
“According to Local 628, the City, by offering a paramedic training course to its firefighters, violated article 33 of the CBA, which contains various provisions concerning the EMS Program, including a provision stating that the ‘EMS Program shall mean the level of services provided as of the date of this Agreement.’ Contrary to the City's contention, a reasonable relationship exists between Local 628's grievance and the general subject matter of the CBA. *** Where, as here, the relevant arbitration provision of the CBA is broad, providing for arbitration of any grievance ‘involving the interpretation or application of any provision of this Agreement,’ a court ‘should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA.’”


Legal Lessons Learned: Courts favor arbitration to resolve labor disputes.

17-1

IL: CT OVERTURNS ARBITRATOR – PURGING POLICE DISCIPLINE RECORDS IS VIOLATION OF STATE’S PUBLIC POLICY

On March 29, 2019, in City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7, the Illinois Appellate Court (1st District) held (3 to 0) that an arbitrator’s decision upholding FOP’s grievance must be set aside.

“The arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records.”

http://www.illinoiscourts.gov/Opinions/AppellateCourt/2019/1stDistrict/1172907.pdf

Legal Lessons Learned: Purging of disciplinary records, even if authorized under a CBA, can result in public records litigation.

The Court referenced a Chicago FD case where an arbitrator was overturned based on public policy. Chicago Fire Fighters Union Local No. 2 v. City of Chicago, 323 Ill. App. 3d 168, 176-77 (2001):


“In May 1997, CFD Internal Affairs Division (‘IAD’) Executive Assistant Mark Edinburg learned of the existence of a videotape of an unauthorized retirement party held on April 12, 1990, at the CFD firehouse known as Engine 100. The videotape depicted firefighters drinking alcoholic beverages inside the firehouse; leaving the firehouse in fire trucks to respond to fire calls; some participants making offensive racial, gender and ethnic slurs; and some engaging in other conduct such as exposing their bare buttocks and genitals. Edinburg viewed the videotape on May 9, 1997. *** This matter calls upon the court to address a serious matter of public policy affecting the health, safety and welfare of the citizens of the city of Chicago. *** The conduct at issue in the present case was recorded on video-tape and reveals public safety workers in an on-going state of intoxication, some participants setting about to perform their duties by way of responding to an alarm for a fire. Nevertheless, the arbitrator ordered reinstatement and barred all discipline and sanctions without considering the merits of the case. Firefighters have the extraordinary responsibility for carrying out the well-stated public policy of safe and effective fire prevention. Firefighters must be prepared to respond immediately to emergency conditions at all times, and in all weather conditions, whenever the alarm bell in the firehouse sounds. For these reasons, and for all of the reasons cited by our
NY: MINIMUM MANNING PER SHIFT - ARBITRATION - 15 FF / SHIFT – 8 CAPTAINS DEMOTED IN 2015

On Feb. 1, 2019, City of Watertown v. Watertown Professional Firefighters Association, Local 191, 2019 NY Slip Op 00753, the New York Supreme Court, Appellant Division, overturned a lower court’s decision and held (5 to 0) that any changes in minimum manning shall go to arbitration under the collective bargaining agreement. “Contrary to the City’s contention, the staffing provisions do not operate to mandate a total number of firefighters that must be employed; rather, they relate solely to the minimum number of firefighters required to be present during shifts and regular operations.”  


Legal Lessons Learned: Courts favor arbitration regarding CBA disputes, unless it involved items that are clearly management right (such as lay-offs).

Note: The City has reportedly decided to ask New York’s highest court [Court of Appeals – 7 Justices] to hear their appeal. See Feb. 5, 2019 article: “City to Take Firefighters Union to NY Supreme Court.”

“WATERTOWN — Three days after losing a lower court’s ruling, the city is taking steps to take an arbitration case against the city’s firefighters’ union to the state’s highest court. *** Coming out of a lengthy executive session, Mayor Joseph M. Butler Jr. said on Monday night the City Council agreed to file the appeal with the Court of Appeals, the state’s highest court…. With the highest court granting just a few of those requests, the city must petition the Court of Appeals and convince the seven-judge panel to take the case because the lower court’s decision was unanimous. ‘It’s a long shot,’ the mayor said.”


See also Feb. 7, 2019 article: “Lawyer Fees For Watertown Fire Department Dispute Nearing $800,000.”

Feb. 1, 2019: NY - Watertown Firefighters Win Legal Victory:
**U.S. SUPREME COURT: ARBITRATION BINDING ON ACCOUNTANT – EMPLOYEE THEREFORE CAN’T SUE**

On May 21, 2018, in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court (5 to 4), 584 U.S. ___ (2018), in a decision written by newly appointed Justice Gorsuch, held:

“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”


**Legal Lessons Learned:** Many employers, including private ambulance companies, will now be encouraged to have new hires sign an arbitration document.

AFL-CIO President Richard Trauma was quoted, “Five justices on the Supreme Court decided that it is acceptable for working people to have their legal rights taken away by corporations in order to keep their jobs.” [https://www.sfgate.com/news/article/Supreme-Court-rules-that-companies-can-require-12931130.php](https://www.sfgate.com/news/article/Supreme-Court-rules-that-companies-can-require-12931130.php)

Note: See Jan. 15, 2019 U.S. Supreme Court decision in *New Prime, Inc. v. Oliveira*, **Holding:** A court should determine whether the Federal Arbitration Act’s Section 1 exclusion for disputes involving the “contracts of employment” of certain transportation workers applies before ordering arbitration; here, truck driver Dominic Oliveira’s independent contractor operating agreement with New Prime Inc. falls within that exception. **Judgment:** Affirmed, 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion. Justice Kavanaugh took no part in the consideration or decision of the case. [https://www.scotusblog.com/case-files/cases/new-prime-inc-v-oliveira/](https://www.scotusblog.com/case-files/cases/new-prime-inc-v-oliveira/)
On Oct. 9, 2020, in Buffalo Police Benevolent Association, Inc. and Buffalo Professional Firefighters Association, Inc. v. Byron W. Brown, Mayor of City of Buffalo, Judge Frank A. Sedita III, Superior Court, Erie County, 2020 NY Slip Op 20257, while recognizing that many other professionals (including judges and attorneys) are protected from public disclosure of unfounded complaints, declined to declare the New York repeal a violation of State or U.S. Constitution.

“§50-a of the NY Civil Rights Law (50-a) was repealed on June 12, 2020. Enacted in 1976, 50-a provided, in relevant part, that personnel records used to evaluate the performance of police officers and firefighters could not be publicly disclosed unless the officer/firefighter consented to it or a court ordered it.

***

At the core of this case, is Petitioners’ dismay that FOIL [Freedom of Information] officers will release unfiltered information that serves not to inform but to defame, especially when revealed to those whom already view police officers with disdain. The prospect of such irreparable harm is viewed as especially inequitable given the fact that members of so many other occupations and professions — including lawyers and judges — are protected by statutes that prevent the disclosure of misconduct allegations made against them, unless and until they are actually proven to be true.

***

“What Petitioners essentially seek — a pre-emptive strike that will serve as a blanket prohibition on the release of any and all information regarding any complaint deemed ‘unsubstantiated’ — is not merely drastic remedy, it is an inappropriate one. Petitioners advance no persuasive arguments as to why the controlling statutes violate due process, equal protection or any other provision of the Federal and State Constitutions.”

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Legal Lesson Learned: It is unfortunate to make mere complaints of misconduct “public records.

Note:

See Aug. 20, 2020 article: “323,911 Accusations of N.Y.P.D. Misconduct Are Released Online.” The records had been sealed for decades, but last month, New York repealed a law keeping them secret after national protests against police brutality. *** The complaints were published in an online database by the New York Civil Liberties Union, which obtained the records from the review board after state lawmakers repealed a law that had kept them secret. https://www.nytimes.com/2020/08/20/nyregion/nypd-ccrb-records-published.html
See review of state statutes on police disciplinary records. In 12 states where “police disciplinary records are generally available to the public. Many of these states still make records of unsubstantiated complaints or active investigations confidential.” [https://project.wnyc.org/disciplinary-records/](https://project.wnyc.org/disciplinary-records/)

**18-6** [also filed, Chap. 13]

**OH: TEMPORARY IMMUNITY DURING COVID-19 PANDEMIC – EMERGENCY RESPONDERS, SCHOOLS PROTECTED TORT LIABILITY**

On Sept. 14, 2020, Ohio Governor Mike DeWine signed House Bill 606 into law. “The bill ensures civil immunity to individuals, schools, health care providers, businesses and other entities from lawsuits arising from exposure, transmission or contraction of COVID-19, or any mutation of the virus, as long as they were not showing reckless, intentional or willful misconduct. It also shields health care providers from liability in tort actions regarding the care and services they provide during this pandemic unless they were acting recklessly or displaying intentional misconduct.” [https://www.wkbn.com/news/coronavirus/dewine-signs-law-giving-covid-19-lawsuit-immunity/](https://www.wkbn.com/news/coronavirus/dewine-signs-law-giving-covid-19-lawsuit-immunity/) This will be particularly helpful to FDs that host paramedic and EMS students needing “ride time” for their certifications. See the statute: [https://www.hannah.com/ShowDocument.aspx?BTextID=219206](https://www.hannah.com/ShowDocument.aspx?BTextID=219206)

Legal Lessons Learned: The statute is an excellent example of legislation providing immunity from tort liability during the pandemic for those serving others, including emergency responders.


**18-5**

**TX: AIR AMBULANCE – WORKERS COMP – FED. AIRLINE Deregulation ACT NOT REQUIRE PAY FULL CHARGES**

On June 26, 2020, in Texas Mutual Insurance Company, et al. v. PHI Air Medical, LLC, the Texas Supreme Court held (7 to 2) that workers comp insurance companies in Texas are only required to pay using the Texas “general reimbursement standards” and the federal Airline Deregulation Act does not provide require Texas to change their reimbursement standards. “This is a case about federalism. When joining our Union, each State retained fundamental aspects of its sovereignty. This sovereignty includes the police power to provide a compensation system for injured workers. Although the Federal Government can preempt a State's exercise of sovereignty by enacting an inconsistent federal law on a subject within its constitutionally enumerated powers, it has no power to order that State to regulate the subject in a particular way.” [https://public.fastcase.com/Wi%2Bt%2BeVuI35%2FN70vAMFZk1fYI9cwrY3IkIgZcFpE1Hk%2FIolkI7JdZ%2BewTVypbzK](https://public.fastcase.com/Wi%2Bt%2BeVuI35%2FN70vAMFZk1fYI9cwrY3IkIgZcFpE1Hk%2FIolkI7JdZ%2BewTVypbzK)
Legal Lessons Learned: The federal Airline Deregulation Act contains no reimbursement requirement for air ambulances.

Note: The two dissenting Justices opinion:

“And Congress, when it decided to deregulate air carrier prices [1978 Airline Deregulation Act], did so with the understanding that its deregulation would allow air carriers to set their own prices—not the state or those who pay air carriers consistent with state guidelines. *** After the insurers paid PHI based on the reimbursement scheme, PHI sought a medical fee dispute resolution before the Division, which ultimately concluded that reimbursement should be ‘fair and reasonable,’ amounting to 125 percent of Medicare service rates. The administrative law judge determined on appeal that the “fair and reasonable” rate was 149 percent of Medicare service rates. The administrative law judge then ordered the insurers to pay an amount consistent with this newly determined “fair and reasonable” amount. Under both approaches—125 or 149 percent—the amount owed was less than the amount PHI charged. After the adjustment, the requisite payment for each transport would be between $9,989 and $28,000.


18-4

PA: PHILADEPHIA FF WITH LUNG CANCER – SMOKER – WILL RECEIVE WORKERS COMP BENEFITS – 2011 STATUTORY PREJUSMPTION LAW

On Jan. 3, 2020, in Wayne Deloatch v. Workers’ Compensation Appeal Board (City of Philadelphia), the Commonwealth Court of Pennsylvania held (3 to 0) that the firefighter is entitled to benefits.

“During Claimant's firefighting career (20 years), he fought approximately 200-300 fires, including building, house, car, dumpster, trash, grass, and field fires, which exposed him to smoke. *** Claimant did not use the SCBA during exterior firefighting—i.e., outdoor firefighting—or overhaul, which entailed ‘ripping of walls, ceilings, searching for any hidden fire and extinguishing that if it's visible.’… After exposure to each fire incident, Claimant's body would be coated in soot, and Claimant would often find soot in his nasal secretions up to a week after exposure…. Claimant further testified that he stopped smoking cigarettes in 2011, but had a 30 to 35-year-long smoking history… During that period, Claimant recalled smoking only one pack of cigarettes per week…. Firefighters were permitted to smoke in the fire stations, and Claimant worked with smokers during his career as a firefighter. *** For the reasons set forth above, Claimant established that he was entitled to the statutory presumption under Section 301(f) of the Act, being that his lung cancer was caused by his occupation of firefighting. Employer failed to rebut the statutory presumption with substantial competent evidence that Claimant's cancer was caused by something other than his workplace exposure to IARC Group 1 carcinogens linked to lung cancer.

https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZi2NtCwkTvdiKyrWKXTmtjwARSxGp50rXf7QoqUpwr%2BO

Legal Lessons Learned: Statutory presumption laws are being enacted throughout our Nation.
RI: CRANSTON FF – 20 YRS ON FD - DIED COLON CANCER 2017 – RI
SUPREME COURT DENIES WIDOW ACCIDENTAL DISABILITY PENSION

On Dec. 18, 2019 in Corrine A. Lang as Executrix of Estate of Kevin Land v. Municipal Employees’ Retirement System of Rhode Island, the Supreme Court of Rode Island ruled (4 to 1) that the widow was not entitled to an award of accidental disability benefits, reversing the Appellate Division of the Workers’ Compensation Court.

“To conclude that the language in § 45-19.1-1 creates a conclusive presumption would not only render the statutory definition of occupational cancer in § 45-19.1-2(d) meaningless and create a right not found within the statute, but would also construe the statute to reach an absurd result. For example, a conclusive presumption that all cancers in firefighters are occupational cancers would mean that a firefighter who smoked four packs of cigarettes a day for decades would receive an occupational cancer disability benefit despite not having proved that his cancer was related to exposure on the job. Similarly, a conclusive presumption would provide occupational cancer benefits to a firefighter who contracted cancer as a result of exposure to pesticides while landscaping in his or her yard. We do not believe the General Assembly would have extended such broad benefits to all firefighters without expressly providing for such in clear and unambiguous language.” https://www.courts.ri.gov/Courts/SupremeCourt/SupremeOpinions/17-295.pdf

Legal Lessons Learned: Firefighter statutory presumption statutes should have “clear and unambiguous” language.

WY: STATE STATUTE, VOLUNTEER FF WHO GETS PAID PER RUN
ENTITLED TO BE IN THE UNION [also filed, Chap. 6]

On July 6, 2018, in IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson, the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly constituted fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.” https://services.courts.state.wy.us/Documents/Opinions/2018WY75.pdf

Legal Lessons Learned: When drafting legislative, using clear language is very important, along with creating a “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.
On May 18, 2018, in State of Ohio v. Andrew Melms, the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: “Granted Melms seemingly was an ideal candidate for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals.”

Legal Lessons Learned: The “911 Good Samaritan” immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).

Note: 911 Dispatchers are required to inform overdose patients about the new law:

R.C. 128.04 provides as follows:
(A) Public safety answering point personnel who are certified as emergency service telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.
(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller’s inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.